

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JERRY DAIL HEAROD aka
Jerry D. Hearod;
JERRI ANNE HEAROD;
CITY OF BROKEN ARROW, Oklahoma;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

APR 19 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EOD: 4-20-95

CIVIL ACTION NO. 94-C-543-B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 19th day of April, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 23, 1995, pursuant to an Order of Sale dated November 30, 1994, of the following described property located in Tulsa County, Oklahoma:

Lot Thirty-three (33), Block Seven (7),
LEISURE PARK II, an Addition to the City of
Broken Arrow, Tulsa County, State of
Oklahoma, according to the recorded Plat No.
3793.

Appearing for the United States of America is
Loretta F. Radford, Assistant United States Attorney. Notice was
given the Defendants, City of Broken Arrow, through Michael R.
Vanderburg, City Attorney, Broken Arrow, Oklahoma, County
Treasurer and Board of County Commissioners, Tulsa County,
Oklahoma, through Dick A. Blakeley, Assistant District Attorney,

NOTE: THIS ORDER IS TO BE MAILED

Tulsa County, Oklahoma, and to the purchasers, Richard F. Kolar and Louise F. Kolar by mail, and to the Defendants, Jerry Dail Hearod and Jerri Anne Hearod, by Publication and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Richard F. Kolar and Louise F. Kolar, their being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Richard F. Kolar and Louise F. Kolar, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be

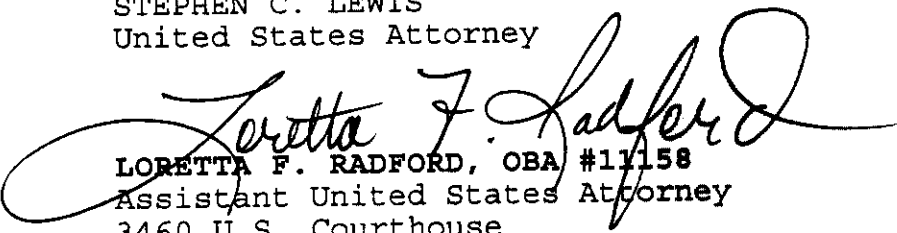
granted possession of the property against any or all persons
now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C-543-B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLAUDE L. GORDON, JR.
aka Claude Lewis Gordon;
NANCY K. GORDON
aka Nancy Kay Gordon
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

APR 19 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EOD: 4-20-95

CIVIL ACTION NO. 94-C-653-B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 19th day of April, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 7, 1995, pursuant to an Order of Sale dated November 28, 1994, of the following described property located in Tulsa County, Oklahoma:

Lot Three (3), Block One (1), WOODPARK, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Claude L. Gordon, Nancy Gordon and County Treasurer and Board of County Commissioners, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma, by

NOTE: THIS DOCUMENT IS TO BE MAILED
BY MOVING IT TO THE CLERK AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be

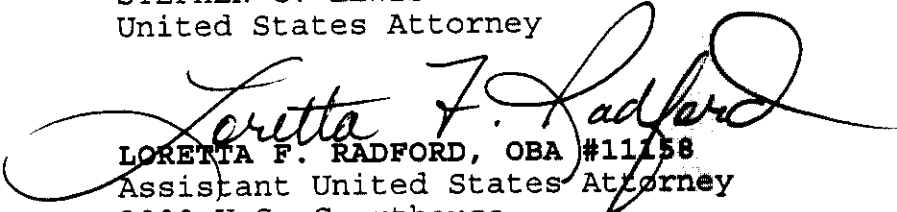
granted possession of the property against any or all persons
now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C-653-B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Tina Ann Blose fka Tina Ann
Kimbrell; Huey Blose; Larry
Eugene Kimbrell; Deborah Loree
Hamman; Beneficial Oklahoma, Inc.)
fka Beneficial Finance Co. of
Oklahoma; State of Oklahoma,
ex rel. Oklahoma Tax Commission;
City of Glenpool;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.) CIVIL ACTION NO. 94-C-172-B

FILED

APR 19 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EOD: 4-20-95

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 19th day of April, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 23, 1995, pursuant to an Order of Sale dated December 5, 1994, of the following described property located in Tulsa County, Oklahoma:

LOT THIRTY-FIVE (35), BLOCK ONE (1), APPALOOSA
ACRES THIRD ADDITION, AN ADDITION TO THE CITY
OF GLENPOOL, TULSA COUNTY, STATE OF OKLAHOMA,
ACCORDING TO THE RECORDED PLAT THEREOF.

TOGETHER WITH:

HUMIDIFIER, RANGE AND OVEN, DISPOSAL, DISHWASHER AND
CARPET.

THE EXPRESS ENUMERATION OF THE FOREGOING ITEMS SHALL NOT
BE DEEMED TO LIMIT OR RESTRICT THE APPLICABILITY OF ANY
OTHER LANGUAGE DESCRIBING IN GENERAL TERMS OTHER PROPERTY
INTENDED TO BE COVERED HEREBY.

NOTE: THIS ORDER IS TO BE MAILED
IN SEPARATE ENVELOPE AND
PROSE LITIGANTS IMMEDIATELY
UPON RECEIPT.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Huey Blose, Beneficial Oklahoma, Inc. fka Beneficial Finance Co. of Oklahoma, City of Glenpool, Oklahoma, State of Oklahoma, ex rel. Oklahoma Tax Commission, through Kim D. Ashley, Assistant General Counsel, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma, and to the purchasers of the property, Jarry M. Jones and Laura A. Jones, by mail, also to the Defendants, Tina Ann Blose fka Tina Ann Kimbrell, Larry Eugene Kimbrell, and Deborah Loree Hamman, by Publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Jarry M. Jones and Laura A. Jones, their being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the **recommendation** of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of **Sale** be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and **execute** to the purchasers, Jarry M. Jones and Laura A. Jones, a **good** and sufficient deed for the property.

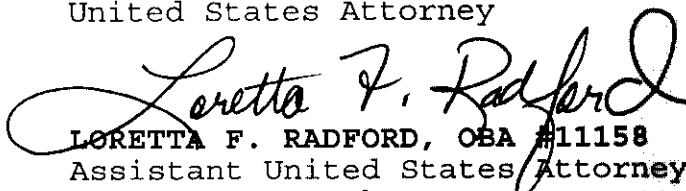
It is the further **recommendation** of the Magistrate Judge that subsequent to the **execution** and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #111158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C-172-B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EOD: 4-20-95

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
NANCY S. WAKEFIELD; ANTHONY C.)
WAKEFIELD; CITY OF BARTLESVILLE,)
Oklahoma; COUNTY TREASURER,)
Washington County, Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Washington County, Oklahoma,)
)
Defendants.)

FILED

APR 19 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C 210B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 19th day of April, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 9, 1995, pursuant to an Order of Sale dated November 10, 1994, of the following described property located in Washington County, Oklahoma:

Lot Nine (9), in Block Two (2) of Sunset Place Addition to Bartlesville, Washington County, Oklahoma.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, City of Bartlesville through City Attorney Jerry Maddux; County Treasurer, Washington County, Oklahoma and Board of County Commissioners, Washington County, Oklahoma, by mail, and to Defendant, Nancy S. Wakefield, by publication, and they do

**NOTE: THIS ORDER IS TO BE MAILED
BY MOVING TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.**

not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

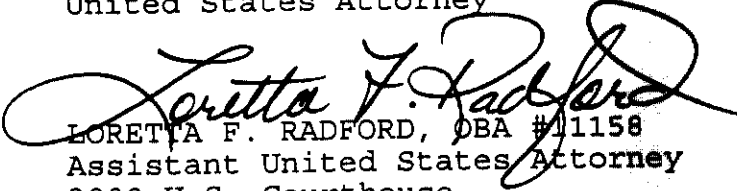
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C 210B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARY D. ROBISON aka GARY DUANE
ROBISON; PATRICIA L. ROBISON aka
PATRICIA LOIS ROBISON; TULSA
ADJUSTMENT BUREAU, INC.;
STATE OF OKLAHOMA *ex rel*
OKLAHOMA TAX COMMISSION;
COUNTY TREASURER, Tulsa County,
Oklahoma; BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

APR 19 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EOD: 4-20-95

CIVIL ACTION NO. 94-C 364B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 19th day of April, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 6, 1995, pursuant to an Order of Sale dated November 21, 1994, of the following described property located in Tulsa County, Oklahoma:

Lot Seven (7), Block Nine (9), SMITHDALE, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Gary D. Robison, Patricia L. Robison, Tulsa Adjustment Bureau, Inc. through its attorney D. Wm. Jacobus, Jr., State of

NOTE: THIS ORDER IS TO BE MAILED
BY MOWANT TO ALL COUNSEL AND
PROSECUTANTS IMMEDIATELY
UPON RECEIPT.

oklahoma ex rel Oklahoma Tax Commission through Assistant General Counsel Kim D. Ashley, and County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Assistant District Attorney Dick A. Blakeley, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #111587

Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C 364B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M. LEE OWINGS aka LEE OWINGS aka
MARSHALL LEE OWINGS aka
M. L. OWINGS; LOU ANN OWINGS;
DAVID L. MARTIN; PATRICIA M.
MARTIN; TULSA CELLULAR
TELEPHONE CO. dba CELLULAR ONE;
OSTEOPATHIC HOSPITAL FOUNDERS
ASSN. dba TULSA REGIONAL MEDICAL
CENTER, formerly OKLAHOMA
OSTEOPATHIC HOSPITAL; BENEFICIAL
OKLAHOMA, INC.; CITY OF BROKEN
ARROW, Oklahoma; COUNTY
TREASURER, Tulsa County,
Oklahoma; BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

CIVIL ACTION NO. 94-C 398B

FILED

APR 19 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EOD: 4-20-95

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 19th day of April, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 6, 1995, pursuant to an Order of Sale dated November 16, 1994, of the following described property located in Tulsa County, Oklahoma:

LOT SEVEN (7), BLOCK TWO (2), LEISURE PARK, AN
ADDITION TO THE CITY OF BROKEN ARROW, TULSA
COUNTY, OKLAHOMA, ACCORDING TO THE
RECORDED PLAT THEREOF.

NOTE: THIS DOCUMENT IS TO BE
FILED IN THE OFFICE OF THE CLERK AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, M. Lee Owings, Lou Ann Owings, Beneficial Oklahoma, Inc., Tulsa Cellular Telephone Co. dba Cellular One and Osteopathic Hospital Founders Association formerly Oklahoma Osteopathic Hospital through their attorney Daniel M. Webb, City of Broken Arrow, Oklahoma through City Attorney Michael R. Vanderburg, and to County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Assistant District Attorney Dick A. Blakeley, by mail, and to the Defendants, David L. Martin and Patricia M. Martin, by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

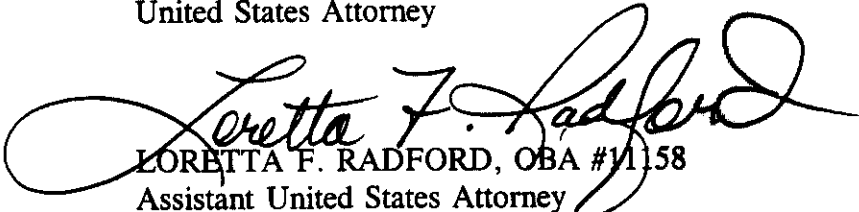
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C 398B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE HEIRS, PERSONAL
REPRESENTATIVES, EXECUTORS,
ADMINISTRATORS, DEVISEES,
TRUSTEES, SUCCESSORS AND ASSIGNS,
IMMEDIATE AND REMOTE, KNOWN AND
UNKNOWN, OF DONALD DALE BUCKRIDGE)
DECEASED;
NANCY BUCKRIDGE;
STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION;
COUNTY TREASURER,
Tulsa County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants,

FILED

APR 19 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EOD. 4-20-95

CIVIL ACTION NO. 94-C-406-B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 19th day of April, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 31, 1995, pursuant to an Order of Sale dated November 10, 1994, of the following described property located in Tulsa County, Oklahoma:

LOT NINE (9), BLOCK FOUR (4), BRIARGLEN CENTER, A RESUBDIVISION OF A PORTION OF THE AMENDED PLAT OF THE RESUBDIVISION OF BLOCKS 2 & 3, BRIARGLEN CENTER ADDITION, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was

**NOTE: THIS ORDER IS TO BE MAILED
BY THE CLERK OF COURT AND
FILED IN THE CASE FILE
UPON RECEIPT OF THE**

given the Defendants, Nancy Buckridge, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma, by mail, and the Defendants, the Heirs, Personal Representatives, Executors, Administrators, Devisees, Trustees, Successors and Assigns, Immediate and Remote, Known and Unknown of Donald Dale Buckridge, Deceased, by Publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the

Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

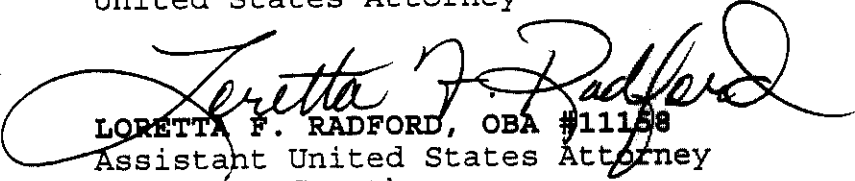
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C-406-B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE UNKNOWN HEIRS, EXECUTORS,
ADMINISTRATORS, DEVISEES,
TRUSTEES, SUCCESSORS AND
ASSIGNS OF RALPH P. NELSON,
DECEASED; STATE OF OKLAHOMA
ex rel OKLAHOMA TAX COMMISSION
COUNTY TREASURER, Tulsa County,
Oklahoma; BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

APR 19 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 94-C 449B

EOD: 4-20-95

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 19th day of April, 1995, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 23, 1995, pursuant to an Order of Sale dated December 12, 1994, of the following described property located in Tulsa County, Oklahoma:

LOT SEVEN (7), BLOCK EIGHTEEN (18), SUMMIT
HEIGHTS ADDITION TO THE CITY OF TULSA, TULSA
COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE
RECORDED PLAT THEREOF.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, State of Oklahoma ex rel Oklahoma Tax Commission through Assistant General Counsel Kim D. Ashley; and to

NOTE: THIS ORDER IS TO BE
BY MAIL TO THE CLERK OF
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma through Assistant District Attorney Dick A. Blakeley, by mail; and to the purchasers, Jarry M. Jones and Laura A. Jones, by mail; and to the Defendants, the Unknown Heirs, Executors, administrators, Devisees, Trustees, Successors and Assigns of Ralph P. Nelson, Deceased, by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Jarry M. Jones and Laura A. Jones, they being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, Jarry M. Jones and Laura A. Jones, a good and sufficient deed for the property.

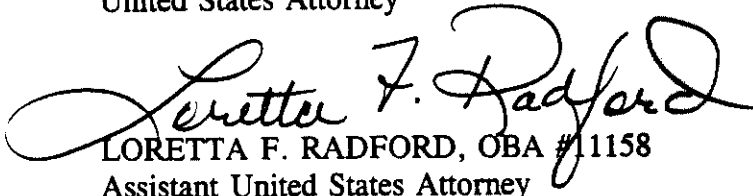
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/JEFFREY S. WOLFE
U.S. MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is fluid and cursive, with the first name "Loretta" being more prominent and the last name "Radford" following in a similar style. The signature is written over the printed name and title of the signatory.

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge
Civil Action No. 94-C 449B

FILED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

APR 19 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

AMRON ENTERPRISES, INC., formerly)
known as Fabsco, Inc.,)

Plaintiff,)

v.)

Case No. 95-C-172 B

MORRISON KNUDSEN CORPORATION,)

Defendant.)

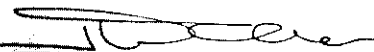
ENTERED ON DOCK

DATE APR 20 1995

DISMISSAL WITHOUT PREJUDICE

Plaintiff, Amron Enterprises, Inc., hereby dismisses its claims against Defendant Morrison Knudsen Corporation, without prejudice, pursuant to Rule 41 (a)(1) of the Federal Rules of Civil Procedure. In support of this dismissal, Plaintiff would show the Court that the Defendant did not file an answer or file a Motion for Summary Judgment in response to the Petition.

Respectfully submitted,



Kenneth F. Albright, OBA #00181
James W. Rusher, OBA #11501
Heath E. Hardcastle, OBA #14247
ALBRIGHT & RUSHER
2600 Bank IV Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5434
(918) 583-5800

ATTORNEYS FOR AMRON ENTERPRISES, INC.

041995b1. jwr (1054.03)

FILED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

APR 19 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

AMRON ENTERPRISE INC., formerly)
known as Fabsco, nc.,)
Plaintiff,)
v.)
MORRISON KNUDSEN CORPORATION,)
Defendant.)

Case No. 95-C-172 B

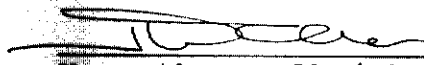
ENTERED ON BOOK

DATE APR 20 1995

DISMISSAL WITHOUT PREJUDICE

Plaintiff, Amron Enterprises, Inc., hereby dismisses its claims against Defendant Morrison Knudsen Corporation, without prejudice, pursuant to Rule 41 (a) (1) of the Federal Rules of Civil Procedure. In support of this dismissal, Plaintiff would show the Court that the Defendant did not file an answer or file a Motion for Summary Judgment in response to the Petition.

Respectfully submitted,


Kenneth F. Albright, OBA #00181
James W. Rusher, OBA #11501
Heath E. Hardcastle, OBA #14247
ALBRIGHT & RUSHER
2600 Bank IV Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5434
(918) 583-5800

ATTORNEYS FOR AMRON ENTERPRISES, INC.

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

APR 19 1995

RL

MICHAEL HENRY MARTIN,

Plaintiff,

v.

TULSA COUNTY COMMISSIONERS, et al.,

Defendants.

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Case No. 94-C-193-H

ENTERED ON DOCKET

DATE APR 20 1995

ORDER

Before the Court for consideration is the Report and Recommendation of United States Magistrate Judge (Docket #26) regarding Defendants' Motion to Dismiss or in the Alternative, Motion for Summary Judgment (Docket #14); Plaintiff's Objection to the Report and Recommendation (Docket #29); and Defendants' Response to Plaintiff's Objection (Docket #30).

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Plaintiff Michael Henry Martin ("Martin") was incarcerated in the Tulsa County Jail as a pretrial detainee from April 30, 1992 through August 24, 1992, at which time he was sentenced and transported to the Oklahoma Department of Corrections. On March 2, 1994, Martin filed this case against Defendants Sheriff Stanley Glanz (in his official and individual capacity), Tulsa County

33

Commissioners Lewis Harris, Robert Dick, and John Selph (in their official and individual capacities), and former Deputy Sheriff Fred Cotton (in his official and individual capacity). In his complaint filed pursuant to 42 U.S.C. § 1983, Martin claims (1) that his equal protection and due process rights were violated when Defendant Cotton attacked him; (2) that this attack constituted cruel and unusual punishment prohibited by the Eighth Amendment; and (3) that Defendants were deliberately indifferent to his serious medical needs.

The Magistrate Judge recommended that the Court grant Defendants' Motion for Summary Judgment in its entirety. As to Defendant Cotton, the Court hereby adopts and affirms that portion of the Report of the Magistrate Judge recommending that summary judgment be granted. As to remaining Defendant Glanz (in his official and individual capacity) and Defendants Tulsa County Commissioners Harris, Dick, and Selph (in their official and individual capacities) (the "Defendants"), the Court hereby adopts and affirms that portion of the Report of the Magistrate Judge recommending that summary judgment be granted as to Martin's claims that his equal protection and due process rights were violated when Defendant Cotton attacked him and that the attack constituted cruel and unusual punishment. The Court declines to adopt the recommendation of the Magistrate Judge as to Martin's third claim, that Defendants were deliberately indifferent to his medical needs.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S.

317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

"[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In Anderson, the Supreme Court stated:

"[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."

477 U.S. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

For purposes of this motion, the Court, as it must, will construe the record liberally in favor of Plaintiff,¹ who opposes

¹ A pro se complaint, "however artfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520, reh'g denied, 405 U.S. 948 (1972).

summary judgment. To set forth a cause of action under Section 1983, Plaintiff must show that the conduct complained of was committed by a person acting under color of state law and that this conduct deprived Plaintiff of some right, privilege, or immunity secured by the Constitution or laws of the United States. Gunkel v. City of Emporia, 835 F.2d 1302, 1303 (10th Cir. 1987).

The Eighth Amendment proscribes "cruel and unusual punishments." The Supreme Court has determined that "deliberate indifference to serious medical needs of prisoners" falls within the Eighth Amendment proscription. Estelle v. Gamble, 429 U.S. 97, 104 (1976), reh'g denied, 429 U.S. 1066 (1977). Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection for medical care as that afforded convicted prisoners under the Eighth Amendment. Martin v. Board of County Comm'rs., 909 F.2d 402, 406 (10th Cir. 1990). Thus, the Court analyzes Plaintiff's inadequate medical treatment claim under the test set out in Estelle. See id. This test has both an objective component requiring that the pain or deprivation be sufficiently serious and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991).

"Deliberate indifference" may be manifested by:

prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

Estelle, 429 U.S. at 104-05. The Tenth Circuit has held that a delay in medical care can constitute a claim if the delay results

in "substantial harm." Olson v. Stotts, 9 F.3d 1475, 1477 (10th Cir. 1993) (citation omitted).

Here, Defendants do not dispute that Plaintiff had a serious jaw condition which required surgery. Thus, the objective component of the Estelle test is satisfied. As to the Defendants' state of mind, Plaintiff claims that his necessary medical treatment was deliberately delayed because of, inter alia, budgetary constraints.

Plaintiff has attached to his complaint a Tulsa World article, dated August 1, 1992, reporting that Sheriff's department officials stated that:

[m]edical costs would have been a lot higher last month if another piece of surgery hadn't been delayed until August. . . . [a sheriff's official] said surgical costs for a prisoner with a malignant tumor in his jaw are expected to hit \$22,000 when the operation is performed. . . . Authorities said the tumor apparently developed while the inmate was in custody.

To date, Defendants have not refuted the facts contained in the newspaper article. If true, these facts could support Plaintiff's claim that the delay of his necessary medical treatment was intentional and, thus, Defendants may have possessed a sufficiently culpable state of mind. Therefore, the Court concludes that there are material questions of fact to be resolved as to whether Defendants' conduct was deliberately indifferent and caused substantial harm.

Plaintiff has sued Tulsa County Commissioners Harris, Dick, and Selph in their individual, as well as official, capacities. Because the Commissioners have no "affirmative link" to the conduct complained of in Plaintiff's deliberate indifference claim, they

cannot be held liable to Plaintiff in their individual capacities. See, e.g., Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988). However, questions of fact sufficient to defeat summary judgment remain as to Defendant Glanz in both his official and individual capacities, see, e.g., id. at 1530-31 ("Sheriff is responsible for making medical care available when necessary to pretrial detainees."), and as to the Tulsa County Commissioners in their official capacities.

In conclusion, the Court hereby adopts and affirms that portion of the Report and Recommendation of the Magistrate Judge recommending that the Court grant summary judgment on all claims in favor of Defendant Cotton and Defendants Harris, Dick, and Selph in their individual capacities and on the claims alleging that Plaintiff was attacked in violation of equal protection, due process, and Eighth Amendment rights in favor of all Defendants. That portion of the Report and Recommendation which deals with Plaintiff's claim of deliberate indifference to medical needs is not adopted.

IT IS SO ORDERED.

This 19th day of April, 1995.



Sven Erik Holmes
United States District Judge

DATE ~~Apr 20 1995~~

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDUSERV TECHNOLOGIES, INC.,
a Minnesota corporation,

Plaintiff,

vs.

ORAL ROBERTS UNIVERSITY,
an Oklahoma non-profit
corporation,

Defendant.

FILED

APR 11 1995

Richard M. Lawless, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-CV-942-K

JUDGMENT

It appearing that EduServ Technologies, Inc. ("ETI") filed its Motion for Summary Judgment and Incorporated Brief ("Motion") herein on March 17, 1995. The Motion was duly served upon the Defendant, Oral Roberts University ("ORU"). ORU has elected not to contest that Motion.

The Motion, and Affidavit annexed thereto, establish there is no genuine issue as to any material fact in this proceeding and, therefore, ETI is entitled to judgment as prayed for therein.

IT IS THEREFORE ORDERED that ETI is granted summary judgment against ORU in the following amounts:

1. Outstanding servicing fees through November 30, 1994, in the sum of Seventy-Nine Thousand Two Hundred Thirty-Eight and 27/100 Dollars (\$79,238.27);
2. Late charges due under the Agreement through November 30, 1994, in the sum of Three Thousand Ninety-Three and 18/100 Dollars (\$3,093.18);

3. Additional late charges accruing at the Agreement rate of One and One-half Percent (1½%) per month, for a per diem rate of Forty and 60/100 Dollars (\$40.60) from December 1, 1994, until paid;

For all of which let execution issue.

DATED: 4-18-95

/s/ TERRY C. KERN

**THE HONORABLE TERRY C. KERN
UNITED STATES DISTRICT JUDGE**

APPROVED AS TO FORM AND CONTENT:

BARROW GADDIS GRIFFITH & GRIMM

By J. Patrick Mensching
J. Patrick Mensching 6136
610 South Main, Suite 300
Tulsa, OK 74119
(918) 584-1600

ATTORNEYS FOR EDUSERV TECHNOLOGIES,
INC.

MOYERS, MARTIN, SANTEE, IMEL & TETRICK

By John W. Cannon
Jack H. Santee
John W. Cannon
Suite 920
320 South Boston Building
Tulsa, OK 74103
(918) 582-5281

ATTORNEYS FOR ORAL ROBERTS UNIVERSITY

JPM/brg
S:\WPDOC\ABH\JPM1\5215-000.OSJ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LYNN JOHNSON,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a corporation
in the State of Delaware; JOHN KENNEDY;
PATSY STINES; and KRIS DESROSIERS,

Defendants.

ENTERED ON DOCKET

DATE APR 19 1995

Case No. 94-C-345-K

FILED

APR 18 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

Upon stipulation of all parties to the dismissal of this action with prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, such action shall be and hereby is dismissed with prejudice.

SO ORDERED this 18TH day of April, 1995.

S/ SVEN ERIK HOLMQUIST

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES SCOTT HOOPER,
Plaintiff,

vs.

TULSA COUNTY SHERIFF'S
DEPARTMENT, et al.,

Defendants.

No. 94-C-343-H ✓

ENTERED ON DOCKET

DATE APR 19 1995

FILED

APR 18 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

Before the Court for consideration are Defendants' motions for summary judgment on the basis of the court-ordered Martinez report, or Special Report,¹ and Plaintiff's cross-motion for summary judgment. (Docs. #12, #16, and #25.) Plaintiff has also moved to stay Defendants' motions for summary judgment, for leave to commence discovery, to amend the complaint to add new defendants and new claims, to join Stephen Craig Burnett as a plaintiff, to file the supplemental complaint of Burnett, for an immediate stay of the proceeding, and to exceed page limitation. (Docs. #25, #27, #40, #44, and #54.)

Plaintiff James Scott Hooper, a state prisoner appearing pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983 against Stanley Glanz, Sheriff of Tulsa County; Bill Thompson, Undersheriff; Brian Edwards, Lieutenant; Russel Lewis, Administrator for Health Services; and Tulsa County Commissioners Lewis Harris, John Selph, and Robert N. Dick, in their individual

¹See Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978).

73

and official capacities. He alleges that defendants deliberately exposed him to one or more inmates with active tuberculosis in violation of his Eighth and Fourteenth Amendment rights during his incarceration in the "medical tank" at the Tulsa City-County Jail (TCCJ), although they knew that he was more susceptible of contracting tuberculosis than the average prisoner because of his infection with Hepatitis A, B, and C, and "possible HIV" infection. Hooper further alleges that on January 28, 1994, a detention officer informed him that there were at least two or three inmates in the "medical tank" with active tuberculosis and that later that day he submitted an "Inmate Health Services Request" and a "Prisoner Request and Grievance," requesting that he be administered a skin test for tuberculosis (PPD skin test) and that he be transferred to another location within the TCCJ. Hooper also alleges that his father, mother, and sister telephoned the Defendants to request that Hooper be tested for tuberculosis and that he be transferred within the TCCJ system. In spite of the written and oral requests, Hooper alleges that defendants ignored his condition and failed to administer a PPD skin test. (First Amended Complaint, doc. # 11.)

In addition to alleging violations of his civil rights, Hooper raises pendent state claims for "violation of state, local, municipal, and Tulsa County Jail health codes, laws, ordinances, and policies concerning isolation of persons with air-borne communicable diseases." (First Amended Complaint at 12.) He seeks a declaratory judgment that Defendants violated his constitutional

rights and compensatory and punitive damages.

Tuberculosis infection is caused by an airborne bacteria which is coughed up and out into the air by an infected person and breathed in by anyone in close enough proximity. DeGidio v. Pung, 704 F. Supp. 922, 924 (D. Minn. 1989). There is a distinction between tuberculosis infection and disease. Tuberculosis infection exists when tubercle bacilli have become established in the body, but are dormant. Id. Tuberculosis disease, or "active" tuberculosis, instead develops when the infection breaks down into active disease and becomes established in the lungs. Id. An infected person who completes a course of INH preventive therapy is generally unlikely to develop the active disease. Id. Screening for tuberculosis can be done with a Mantoux skin test by injecting purified protein derivative (PPD skin test). Id. at 925.

II. UNDISPUTED FACTS

The following facts are undisputed in the record.

1. The Board of County Commissioners of the County of Tulsa, on behalf of the Tulsa County Sheriff's Office, has contracted with Correctional Medical Systems (CMS) to provide reasonable and necessary health care to individuals in the custody and control of the Tulsa County Sheriff. Lewis, the health administrator for the TCCJ, is an employee of CMS. (Special Report at 9 and ex. J.)
2. The TCCJ has a policy of screening every inmate who is booked into the jail by completing a health screening form and checking for signs of active tuberculosis disease. If a member of

the medical staff believes that it is possible that an individual being booked into the jail has active tuberculosis, that person is not allowed to stay in the TCCJ. (Lewis's affidavit, ex. B to Defendant Lewis's motion for summary judgment, doc. #17; Special Report at 15 and ex. L.)

3. Within ten days of booking into the TCCJ, every inmate receives a physical examination and a PPD test to detect the presence of tuberculosis. If an inmate has a positive reaction to the PPD test, he is immediately referred to the Tulsa County Health Department or a local hospital for immediate screening to determine whether or not he has "active" tuberculosis. If an individual is found by the health department or hospital to have "active" tuberculosis, he is held in isolation at the health department or hospital for ten days and given medications. The infected inmate is not permitted to return to the TCCJ until after the ten-day period when he is no longer contagious. (Lewis's affidavit, ex. B to Defendant Lewis's motion for summary judgment, doc. #17; Special Report at 15.)

4. Prior to his incarceration, Hooper was diagnosed for Hepatitis B and C and for "possible" HIV infection. (Special Report at 11 and 17-18.) In March 1993, Hooper tested negative for tuberculosis. (Plaintiff's Response, doc. #25, ex. D-2.)

5. On January 9, 1994, Hooper was arrested and incarcerated in the TCCJ where he remained until he was transported to Lexington

Assessment and Reception Center (LARC) on February 11, 1994.²
(Special Report at 9.)

6. Hooper's Health Screening Form, completed on January 10, 1994, indicates that he had Hepatitis B, C, and Delta, and that he had tested positive for the HIV virus. (Special Report at 11.)

7. Hooper concedes that he has "a documented history of . . . emotional problems by exhibiting anti-social and narcissistic behavior with manipulative overtones and attention-seeking behavior" (Plaintiff's response, doc. #25, at 6, and Special Report at 16, 19), and that he was taking Lithium Carbonate and Elavil during part of his incarceration at the TCCJ. (Special Report exs. D, E, and F.)

8. The nurse's notes reveal that Hooper was placed on mental watch during the morning of January 11, 1994, because of an alleged suicide attempt. Later that afternoon a guard found Hooper with a sheet around his head and chin. On January 12, 1994, at 1:45 a.m., officers notified the nurse on duty that Hooper had inserted pieces of metal from a broken light bulb into his rectum. An x-ray taken later that morning did not reveal any "opaque foreign body suggestive of metal or glass." On January 14, 1994, at 4:30 a.m., the nurse was asked to look at Hooper because he was bleeding but did not know from where the blood was coming. Upon examination the nurse did not find any blood and noted that Hooper had been scratching his abdomen. On January 17, 1994, Hooper complained of

²Although Plaintiff was incarcerated in the TCCJ on December 9-10, 1993, that confinement is not at issue in this case. (Special Report at 9.)

an alleged seizure although there were neither witnesses nor evidence of bitten tongue which is usually associated with a seizure. On January 18, 1994, Dr. Trumcas, a CMS psychiatrist, noted that Hooper had "bipolar disorder and mixed personality disorder" and that he was "very manipulative and tries to dictate his own treatment." (Special Report at 11-14.)

9. On January 19, 1994, pursuant to prison policy, Nurse Jimmie Allie asked Hooper to come to the medical examination area for a physical examination and a PPD skin test. Hooper refused to get out of bed. (Special Report at 14.)

10. On February 24, 1994, after his transfer to LARC, Hooper was administered a PPD skin test. The results were reported positive on January 27, 1994. Hooper had a reaction measuring 24mm by 27mm. Anything above 10mm is considered positive. (First Amended Complaint exs. A and B.)

11. On February 24, 1994, Hooper tested negative for HIV. (Special Report at 20.)

12. Because of the positive reading for tuberculosis, a chest x-ray was taken on March 2, 1994. The results of the x-ray, however, did not indicate any signs of active infection for tuberculosis. (Plaintiff's Response, doc. #25, ex. I.)

13. On March 4, 1994, Plaintiff was prescribed Isoniazid (INH) as a prophylactic medical procedure to prevent the onset of active tuberculosis. (Plaintiff's Response, doc. #25, exs. I and J.)

14. On March 31, 1994, KJRH Channel Two interviewed Lt.

Edwards about a TCCJ inmate who was found to be infected with active tuberculosis and the precautions the jail was taking to prevent a tuberculosis outbreak. Lt. Edwards stated that the inmate with active tuberculosis was hospitalized immediately and that the jail tested over 300 inmates for the tuberculosis virus by using the PPD skin test. (Special Report at 16 and ex. P.)

II. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988)). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual

dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a pro se plaintiff is a prisoner, a court authorized "Martinez Report" (or Special Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. On summary judgment, the court may treat the Martinez Report as an affidavit, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. This process is designed to aid the court in fleshing out possible legal bases of relief from unartfully drawn pro se prisoner complaints, not to resolve material factual disputes. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's pro se pleadings liberally for purposes of summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972).

III. ANALYSIS

A. Exposure to Tuberculosis

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The "unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment." Whitley v. Albers, 475 U.S. 312, 319 (1986). To sustain an Eighth Amendment violation based on deliberate indifference, however, a plaintiff must allege and prove that the conditions evidence a wanton disregard for safety of prisoners and that prison officials had a "sufficiently culpable state of mind." Farmer v. Brennan, 114 S. Ct. 1970, 1977 (1994). Prison conditions "must not involve the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Neither can they be disproportionate to the severity of the crime warranting imprisonment. Id.

"[D]eliberate indifference to the serious medical needs of prisoners [also] constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment." Estelle v. Gamble, 429 U.S. 97, 104 (1976) (citation omitted). This standard has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991). With regard to the subjective component, "allegations of 'inadvertent failure to provide adequate medical care' or of a

'negligent . . . diagnos[is]' simply fail to establish the requisite culpable state of mind." Id. at 2323; see also El'Amin v. Pearce, 750 F.2d 829, 832-33 (10th Cir. 1984).

In this action, Hooper does not challenge the adequacy of the medical treatment which he has received since testing positive for tuberculosis.³ Rather the gist of this action is whether Defendants deliberately exposed him to at least one inmate with active tuberculosis during his incarceration in the "medical tank" at the TCCJ, and whether their actions created an unreasonable risk of harm to his health. See Reischmann v. Lewis, No. 92-15890, 1993 WL 26995, at *2 (9th Cir. Feb. 5, 1993) (unpublished opinion) (remanding the case to permit the prisoner to present evidence on the level and degree of exposure to tuberculosis and on whether the degree of exposure was sufficient to create an unreasonable risk of harm to his health; the prisoner had alleged deliberate exposure to tuberculosis as well as inadequate medical care).

Several courts have recognized that unreasonable exposure to a serious, communicable disease, such as tuberculosis, is actionable under the Eighth Amendment, since it could constitute both harm to the serious medical needs of an inmate and demonstrate prison officials' deliberate indifference to this harm. See Reischmann, 1993 WL 26995, at *2; Karlovetz v. Baker, 872 F. Supp. 465, 467 (N.D. Ohio 1994); Triggs v. Marshall, 1994 WL 109748, at

³The preventative treatment which Hooper has received since March 4, 1994, would belie any claim of deliberate indifference on the part of the Oklahoma Department of Corrections. See Felders v. Miller, 776 F. Supp. 424, 426-427 (N.D. Ind. 1991).

*3 (N.D. Cal. Mar. 21, 1994) (unpublished opinion); Spivey v. Doria, 1994 WL 97756, at *6 (N.D. Ill. Mar. 24, 1994) (unpublished opinion); Wright v. Baker, 849 F. Supp. 569, 573 (N.D. Ohio 1994).⁴ "An unsubstantiated fear of contracting a serious disease," however, cannot be the "basis for a constitutional claim." Quarles v. De La Cuesta, 1993 WL 86460, at *1 (E.D. Pa. Mar. 23, 1993) (unpublished opinion) (collection of cases) (undisputed medical evidence established that on the date plaintiff was ordered back to his cell, his cell mate did not have active tuberculosis and had already begun taking the antibiotic isoniazid to prevent his infection from becoming active).

In Helling v. McKinney, 113 S. Ct. 2475, 2480 (1993), the Supreme Court also recognized "that prison officials may [not] be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms." In Helling, a prisoner brought a section 1983 action against prison officials claiming that involuntary exposure to his cellmate's environmental tobacco smoke (ETS) created an unreasonable risk to his health, thus subjecting him to cruel and unusual punishment. Id. at 2478-79. The prison officials moved to dismiss the action arguing that the prisoner was

⁴See also Holt v. Norris, No. 88-5979, 1989 WL 25539 (6th Cir. 1989) (unpublished opinion) (citing Glick v. Henderson, 855 F.2d 536 (8th Cir. 1988) (a claim is stated if there is a pervasive risk of harm to inmates of contracting the AIDS virus and if there is a failure of prison officials to respond to the risk)); Lareau v. Manson, 651 F.2d 96, 109 (2d Cir. 1981) (unnecessary to require evidence that an infectious disease has actually spread in an overcrowded jail before issuing a remedy).

unable to show any current health problems resulting from his exposure to ETS. Id. The Supreme Court rejected the officials theory "that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment," and held that a prisoner's compelled exposure to secondary tobacco smoke may constitute cruel and unusual punishment if the exposure is at such levels as to pose an unreasonable risk of harm and if the prison officials are deliberately indifferent to the inmate's situation.⁵ Id. at 2481.

Therefore, to establish unreasonable exposure to tuberculosis under the Eighth Amendment, Hooper must establish that Defendants in fact were aware that his incarceration in the "medical tank"

⁵In analyzing whether the Eighth Amendment protects against future health problems of inmates, the Supreme Court stated as follows:

We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year. In Hutto v. Finney, 437 U.S. 678, 682, 98 S.Ct. 2565, 2569, 57 L.Ed.2d 522 (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed. We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.

Id. at 2480.

subjected him to an excessive or substantial risk of contracting tuberculosis and that nevertheless they failed to act on that knowledge in violation of Hooper's constitutional rights.⁶

Viewing the evidence in the light most favorable to Hooper, the Court concludes that there exists a genuine issue of material fact as to whether at least one inmate with active tuberculosis was housed in the "medical tank" during the period at issue in this action. Hooper attests that during the early hours of January 28, 1994, John Doe "B," a sheriff deputy, accidentally informed him that CMS and the TCCJ were concerned that two or three prisoners with active tuberculosis were housed on the eighth floor and in the "medical tank" of the TCCJ.⁷ The March 31, 1994 news report of KJRH Channel Two further reveals that at least one inmate with active tuberculosis was housed on the eighth floor of the TCCJ shortly after Hooper was transferred to LARC. (Special Report, ex. P.) Lt. Edwards stated that the inmate with active tuberculosis

⁶The fact that Hooper was a pre-trial detainee during part of his incarceration at the TCCJ, is immaterial as to whether Defendants' conduct violated his Fourteenth or Eighth Amendment rights. See Bell v. Wolfish, 441 U.S. 520, 535 (1979) (the Due Process Clause of the Fourteenth Amendment protects pretrial detainees from actions which amount to punishment). The Tenth Circuit Court of Appeals has recognized that pretrial detainees are entitled to the same degree of protection with regard to medical care under the Due Process Clause of the Fourteenth Amendment as that afforded convicted prisoners under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990). Therefore the Court will analyze Hooper's exposure claim under the Estelle standard outlined above.

⁷Because Plaintiff's first amended complaint is sworn under penalty of perjury and states facts which are based on personal knowledge, the Court may treat it as an affidavit. See Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991).

was hospitalized and that about three hundred inmates on the eighth floor of the TCCJ were administered the PPD skin test.

Even assuming that an inmate in the "medical tank" was infected with active tuberculosis during the period of Hooper's incarceration, there still remain genuine issues of material fact as to whether Defendants knew of the condition of the infected inmate before Hooper was transferred to LARC on February 11, 1994. The timing of the diagnosis of the infected inmate may be relevant to the issue of Defendants' knowledge of an active case of tuberculosis on the eighth floor of the TCCJ during the period of Hooper's incarceration. In Wright v. Baker, 849 F. Supp. 569, 575 and n.15 (N.D. Ohio 1994), the court held that, even if the inmate had tested positive for exposure to tuberculosis, he could not establish that prison officials knew that an inmate had active tuberculosis and failed to act on that knowledge. The undisputed evidence in that case showed that the infected inmate was not diagnosed with active tuberculosis until after he had left the prison and, once diagnosed, he was not returned to the prison. Id. Accordingly, "[t]he fact that [Hooper] might have been exposed to an inmate who was later discovered to have active tuberculosis [will] not [be] enough to show an Eighth Amendment claim." Id.

Genuine issues of fact may also exist as to whether Hooper will ever suffer an actual injury--i.e., whether his inactive tuberculosis infection will ever develop into the active disease given that Hooper has received preventive treatment for over one year. See McCorkle v. Walker, 871 F. Supp. 555, 558 (N.D.N.Y.

1995) (denying relief under the Eighth Amendment for alleged exposure to tuberculosis where defendants demonstrated conclusively that they responded reasonably to plaintiff's exposure to tuberculosis by administering INH antibiotic and it was undisputed that plaintiff had not suffered, and was unlikely ever to suffer, an active case of tuberculosis); Turner v. Elrod, No. 83-C-6418, 1985 WL 1789, at *1 (N.D. Ill. May 28, 1985) (unpublished opinion) (denying prayer for injunctive relief because plaintiff, who had been receiving INH medication for approximately one year, had suffered no physical injury from his exposure to tuberculosis). It is generally accepted that active tuberculosis can be averted with INH therapy. DeGidio v. Pung, 704 F. Supp. 922, 924 (D. Minn. 1989).

Accordingly, Defendants' motion for summary judgment should be denied on any claim of deliberate exposure to tuberculosis which Hooper has alleged against the Defendants in their official capacities. Defendants argue, however, that they should be entitled to judgment as a matter of law on any claims Hooper has alleged against them in their individual capacities. The Court will address that issue below.

B. Claims Against the Defendants in their Individual Capacities

In the context of civil rights claims against government officials, it is a well established principle that a defendant may not be held individually liable under section 1983 unless the defendant caused or participated in the alleged constitutional

deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a section 1983 action. Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991). A person deprives another of a constitutional right within the meaning of section 1983 if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which plaintiff complains. Volk v. Coler, 845 F.2d 1422, 1431 (7th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988). In the present case, Defendants will be held individually liable only if, by their own conduct, they deprived Plaintiff of any rights secured under the Constitution. See Rizzo v. Goode, 423 U.S. 362, 377 (1976); Duckworth v. Franzen, 780 F.2d 645, 650 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986), declined to follow on other grounds by Berry v. City of Muskogee, 900 F.2d 1489 (10th Cir. 1990).

Viewing the evidence in the light most favorable to Hooper, the Court finds that there remain genuine issues of material fact as to the personal involvement of Defendants Glanz, Thompson, Edwards, and Lewis. Hooper attests that on January 28, 1994, he wrote to Glanz, Thompson, Edwards, and Lewis, complaining about being exposed to one or more inmates with active tuberculosis and requesting that he be administered a PPD skin test and that he be transferred to another location within the TCCJ system. Hooper's father, mother, and sister also attest that they personally telephoned Glanz, Thompson, and Edwards on January 28, 1994,

requesting a transfer and a PPD skin test for Hooper. Despite these requests, Defendants took no action to reduce Hooper's alleged exposure to active tuberculosis. Lewis has denied receiving the January 28, 1994 "Inmate Health Service Request."

The Court holds, however, that the County Commissioners, Harris, Selph, and Dick, cannot be held individually liable for the alleged exposure to tuberculosis caused by the sheriff, undersheriff, or any of the deputies. "Under Oklahoma law, the Board has no statutory duty to hire, train, supervise or discipline the county sheriff or their deputies." Meade, 841 F.2d at 1528 (citing Okla. Opin. Atty. Gen. No. 79-98, at 14 (May 15, 1979)). "Consequently, unless the Commissioners voluntarily undertook responsibility for hiring or supervising county law enforcement officers, which is not alleged, they were not 'affirmatively linked' with the alleged" deliberate exposure to tuberculosis. Id. They are, therefore, entitled to judgment as a matter of law on any claims which Hooper has alleged against them in their individual capacities.⁸

C. Punitive Damages

Because Hooper's claims against Defendants Glanz, Thompson, Edwards, Harris, Selph, Dick, and the John Does in their official

⁸The Oklahoma statutes on which Plaintiff relies relate only to the official duties of the Commissioners. 57 O.S. § 2 (annual inspection of jail by County Commissioners); 57 O.S. § 41 (establishment of county jails); 19 O.S. § 526 (annual inspection of jail by sheriff and report to the board of county commissioners).

capacities are actually claims against the County of Tulsa, punitive damages cannot be awarded. It is well established that a municipality is not liable for punitive damages in a proceeding under 42 U.S.C. § 1983. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981); Butcher v. City of McAlester, 956 F.2d 973, 976 n.1 (10th Cir. 1992); Wulf v. City of Wichita, 883 F.2d 842, 855 n.19 (10th Cir. 1989). Accordingly, Defendants Glanz, Thompson, Edwards, Harris, Selph, Dick, and the John Does are entitled to judgment as a matter of law on any prayer for punitive damages.

D. State of Oklahoma as a Defendant

Although Hooper named in the caption of his first amended complaint (doc. #11) the "State of Oklahoma, et al.," he has not alleged any constitutional violations on the part of the State of Oklahoma. Accordingly, the Court sua sponte dismisses the State of Oklahoma with prejudice.

E. "Possible" HIV Infection

Nor does the Court need to consider Hooper's contention that Defendants were under a greater duty to take precautionary measures because of his "possible" or "actual" infection with the HIV virus in light of the fact that he has since tested negative for that virus. It is fundamental that federal courts do not render advisory opinions. Barr v. Matteo, 355 U.S. 171, 172 (1957); Oklahoma City, Oklahoma v. Dulick, 318 F.2d 830, 831 (10th Cir.

1963). In order to sustain a claimed denial of constitutional rights, one must allege and demonstrate "some threatened or actual injury resulting from the putatively illegal action . . . abstract injury is not enough. . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

F. Motion for Leave to Amend

Since the filing of Defendants' motions for summary judgment, Hooper has moved for leave to amend his complaint to add five new claims and to join four additional defendants and one new plaintiff. (Docs. #40 and #44.) This is not Hooper's first attempt to amend his complaint. (Doc. #3.) In June 1994, the Court granted Hooper's first motion for leave to amend the complaint to add as Defendants Lewis and Commissioners Harris, Selph, and Dick.⁹ (Docs. #7, #10, and #11.)

1. Motion to Add New Defendants and Claims

In his first motion, Hooper seeks to join as defendants, under Fed. R. Civ. P. 19(a), John Doe "C", a deputy sheriff, Walter J. Schriver, former President and CEO of CMS, and two nurses employed

⁹The Court also notes that Plaintiff's motions for leave to amend are in contravention of the April 19, 1994 order, granting Hooper leave to proceed in forma pauperis and requiring a Martinez report. That order specifically provided that "[n]o applications, motions, or discovery should be filed or considered until the steps set forth in this order have been completed, and an order entered, except as the court further orders." (Doc. #3 at 2.)

by CMS, Jimmie Allie and Jane Doe "D."¹⁰ He alleges that Allie and John Doe "C" forged his signature on a waiver form on January 19, 1994, when he refused to get out of bed for a physical examination and a PPD skin test. (Special Report, ex. I.) He further alleges that Jane Doe "D" conducted the initial screening after Hooper was booked in the TCCJ, and that Schriver failed to supervise the employees of CMS.

Hooper also seeks to expand this action to allege the following claims under the Fifth, Fourteenth, and Eighth Amendments:

(1) that Defendants violated his constitutional rights when they "disregarded CMS's HIV Policy Directive Statement Number Six (6) [that an inmate's health record are not to be marked in any way by distinguishing the inmate's HIV status] . . . by stamping with a rubber stamp in red ink "MEDICAL ALERT" and thereunder distinguishing Plaintiff's HIV status upon at least four (4) CMS/TCCJ health records and other miscellaneous documents" and when they housed him in "the HIV/Medical Tank upon the eighth floor of the TCCJ along with other inmates who were segregated because of their HIV status and other serious medical conditions" . . . "in violation of CMS' HIV Policy Directive Statement Number Four (4)" that HIV positive inmates will not be segregated from the general population on the basis of their HIV status.

(2) that Defendants violated his constitutional rights

(a) when they failed to x-ray Plaintiff's chest pursuant to CMS's TB Policy Directive Statement Number Four (4) (that "if the Mantoux skin test cannot be given for any reason, the inmate will have chest x-ray to rule out Tuberculosis") after Plaintiff refused to submit to a PPD skin test on January 19, 1994, and

(b) when they failed to x-ray Plaintiff's chest although they knew he was HIV positive.

¹⁰Although Plaintiff mentioned Mr. Schriver and Jane Doe "D" for the first time in his proposed second amended complaint, the Court will consider whether they should also be joined as parties. "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

(3) that Defendants violated his constitutional rights when they failed to "(a) PPD skin test Plaintiff and all other inmates immediately upon entry into the TCCJ rather than on the tenth (10th) day"; (b) "chest x-ray and/or complete sputum smears and/or urinalysis upon Plaintiff and either TB symptomatic inmates or those who have either confirmed or suspected HIV-infection immediately upon entry into the TCCJ; (c) provide 'respiratory isolation' facilities for Plaintiff and both TB symptomatic inmates and those with either confirmed or suspected HIV-infection immediately upon entry into the TCCJ; and (d) separate TB-positive from TB-negative inmates at all times germane to this action. . ."

(4) that Defendants violated his constitutional rights when they forged his name on the "CMS Release of Responsibility Form" (waiver form) on January 19, 1994.

(5) that Defendants violated his constitutional rights (a) when they "knowingly and willfully housed the immunosuppressed Plaintiff within the HIV/Medical Tank in dangerously close proximity to and within the same housing are and cell as at least one inmate who had active pulmonary tuberculosis"; and (b) when they continued to house him in the "HIV/Medical Tank" despite the requests of Plaintiff and his father, mother, and sister.

(6, 7, 8) that Defendants violated his constitutional rights when they caused Plaintiff to be exposed to tuberculosis and contract the tuberculosis virus and as a result continue to cause Plaintiff to suffer from the side effects from the INH preventative treatment, and severe emotional distress associated with the fear that Plaintiff's inactive tuberculosis might one day become active.

(9) that Defendants "violated local, state, and federal health codes, administrative laws, etc." in addition to Plaintiff's constitutional rights.

(10) that Defendants violated his constitutional rights when they failed to respond to his written requests and the requests of his father, mother, and sister for a PPD skin test and a cell reassignment.

(Proposed Second Amended Complaint at 21-26.)

a. New Defendants

Hooper's reliance on Fed. R. Civ. P. 19(a) to join four new defendants is improper. Rule 19(a) provides:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Because Hooper has neither showed nor asserted that a final decree could not be entered without the presence of Schriver, Allie, John Doe "C," and Jane Doe "D," the Court concludes that joinder is not mandatory in this case. See Fitzpatrick v. Board of Education, City of Enid Public Schools, 578 F.2d 858, 860 (10th Cir. 1978). Parties may be added, however, under Fed. R. Civ. P. 15(a). See Frank v. U.S. West, Inc., 3 F.3d 1357, 1365 (10th Cir. 1993) (Rule 15(a) also governs a motion to add a party). Under that rule, a party may amend its pleadings once as a matter of course at any time before a responsive pleading is served. Because Hooper has already amended his complaint once, he can only amend by leave of Court or by written consent of the adverse party. Fed. R. Civ. P. 15(a).

Although Rule 15(a) provides that leave to amend "shall be freely given when justice so requires," whether leave should be granted is still left to the discretion of the district court. Uselton v. Commercial Lovelace Motor Freight, Inc., 940 F.2d 564, 586 (10th Cir. 1991) (cited case omitted). "Refusing leave to amend is generally only justified upon a showing of undue delay,

undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." Frank, 3 F.3d at 1365. The Haines rule, however, requires this Court to construe Hooper's pro se complaint liberally, see Haines v. Kerner, 404 U.S. 519, 520 (1972), and to grant him a reasonable opportunity to amend defects in his pleadings, see Hall v. Bellmon, 935 F.2d 1106, 1110 n.3 (10th Cir. 1991) (citing Reynoldson v. Shillinger, 907 F.2d 124, 126 (10th Cir. 1990), Jaxon v. Circle K Corp., 773 F.2d 1138, 1140 (10th Cir. 1985)).

After carefully reviewing the second amended complaint (submitted on February 15, 1995), Defendants' objections, and Hooper's replies, the Court denies Hooper's request for leave to amend the complaint to add Schriver, Allie, John Doe "C," and Jane Doe "D" as defendants. Even reading the motion and the proposed amendment liberally, Hooper makes no factual allegations to support a claim against any of these individuals. Hooper apparently seeks to add these individuals as defendants merely because they are mentioned in, and/or provided information for, the Martinez report, and because they may be prospective witnesses at trial.

Schriver, the former President and CEO of the Corporation which operates CMS, has no connection to this case.¹¹ He was not involved in any of the decisions or actions which Hooper alleges led to his civil rights violations. See Meade v. Grubbs, 841 F.2d

¹¹State action is not at issue although Plaintiff raises it in his latest reply.

1512, 1528 (10th Cir. 1990) (a defendant cannot be individually liable under section 1983 unless that defendant personally participated in the challenged action). Moreover, to the extent that CMS policies and actions are in question, Hooper has already sued Russel Lewis, the administrator of the TCCJ medical facilities, in both his individual and official capacities.

Nor were Allie, John Doe "C," and Jane Doe "D" involved in any of the decisions which are the subject of this civil rights action. Allie and John Doe "C" allegedly forged Hooper's signature on the waiver form on January 19, 1994, once Hooper refused the physical examination and the PPD skin test. Jane Doe "D" instead conducted the initial screening after Hooper was booked in the TCCJ on January 9, 1994, and stamped "medical alert" and noted that Hooper was HIV positive on medical forms and other documents. Neither the claims against Allie and John Doe "C" nor the claims against Jane Doe "D" would suffice to state a constitutional violation under section 1983, see West v. Atkins, 487 U.S. 42, 48 (1988) (only the violation of a right secured by the Constitution or laws of the United States is actionable under 42 U.S.C. § 1983), and therefore leave to amend to add these defendants should be denied as futile. See Ketchum v. Cruz, 961 F.2d 916, 920 (10th Cir. 1992) (futility of amendment is an adequate justification to refuse to grant leave to amend).

b. New Claims

Next, the Court denies Hooper's request for leave to amend the

complaint to allege claim one, claim two sub-part "b," claim three sub-parts "b" and "c," claim four, and claim ten.

The first three claims raise in part hypothetical questions with regard to Hooper's HIV infection and the additional duty imposed on the Defendants as a result of that "possible" infection. As noted above, this Court cannot render advisory opinions. While it is true that at the time Hooper was incarcerated at the TCCJ the Defendants thought he was either actually or possibly HIV positive, it is undisputed that Hooper has since tested negative for the HIV virus. Therefore, any opinion as to the TCCJ's HIV policy would be merely advisory. Barr v. Matteo, 355 U.S. 171, 172 (1957); Oklahoma City, Oklahoma v. Dulick, 318 F.2d 830, 831 (10th Cir. 1963).

Claims four and ten would not withstand a motion to dismiss for failure to state a claim and therefore should be denied as futile. In his fourth claim Hooper alleges that Defendants violated his First, Fourth, Fifth, and Fourteenth amendment rights when they "illegally and feloniously forged" his name on the waiver form. As noted above, this claim does not state a constitutional violation. See West v. Atkins, 487 U.S. 42, 48 (1988).

In his tenth claim, Hooper alleges that Defendants denied his Fifth, Fourteenth, and Eighth amendment rights when they failed to respond to his January 28, 1994 health service request and prisoner request and grievance, and failed to comply "with their expressed promises verbally given to Plaintiff's father, mother, and his sister over the telephone on January 28, 1994." (Second Amended

Complaint at 26.)

A prison official's failure to adequately respond to a prisoner's grievance does not implicate a constitutional right. See Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993) (per curiam) (official's failure to process inmates' grievances, without more, is not actionable under section 1983); Greer v. DeRobertis, 568 F. Supp. 1370, 1375 (N.D. Ill. 1983) (prison officials' failure to respond to grievance letter violates no constitutional or federal statutory right); see also Shango v. Jurich, 681 F.2d 1091 (7th Cir. 1982) (a prison grievance procedure does not require the procedural protections envisioned by the Fourteenth Amendment). "[A prison] grievance procedure is a procedural right only, it does not confer any substantive right upon the inmates. Hence, it does not give rise to a protected liberty interest requiring the procedural protections envisioned by the fourteenth amendment." Buckley, 997 F.2d at 495 (quoting Azeez v. DeRobertis, 568 F. Supp. 8 (N.D. Ill. 1982)); see also Mann v. Adams, 855 F.2d 639, 640 (9th Cir.), cert. denied, 109 S. Ct. 242 (1988) (an inmate has no legitimate claim of entitlement to a grievance procedure).

An official's "[f]ailure to comply with prison regulations does not give rise to a constitutional claim absent unmistakably mandatory language in the regulation." Johnson v. Rardin, 1992 WL 9019 *2 (10th Cir. 1992) (unpublished opinion) (citing Hewitt v. Helms, 459 U.S. 460, 471 (1983)). Hooper has not alleged any such mandatory language in the case at hand. Therefore, the Court concludes that Hooper may not base a section 1983 claim solely on

allegations that Defendants Glanz, Thompson, Edwards, and Lewis failed to respond to his "inmate health request" and grievance and that they failed to investigate the facts set forth in those requests.

In the alternative, the Court notes that Hooper's allegations assert, at most, negligent conduct which does not implicate the Due Process Clause. See Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991) (negligent conduct by prison officials with respect to grievance procedure does not implicate the Due Process Clause). Accordingly, the Court concludes that Hooper's tenth ground for relief as alleged in his second amended complaint would not withstand a motion to dismiss for failure to state a claim and therefore granting leave to amend would be futile.

Due to the fact that Hooper's second amended complaint is lengthy and neatly typewritten with numerous attachments, the Court finds that it would be in the best interest of justice and judicial efficiency to file the second amended complaint as it has been submitted by Hooper and to note in the record that the Court hereby denies Hooper leave to add defendants Schriver, Allie, Doe "C," and Doe "D" and claim one, claim two sub-part "b", claim three sub-parts "b" and "c," claim four, and claim ten.

2. Motion for Leave to Join Burnett as a Plaintiff

In his second motion, Hooper seeks to join as a plaintiff Stephen Craig Burnett (a former inmate of the TCCJ) and seeks leave to file a supplemental complaint on behalf of Burnett. Hooper

alleges that Burnett should be joined as a plaintiff in this action because he was housed, just like Hooper, in the "medical tank" of the TCCJ with one or more inmates who were known to have active tuberculosis. Burnett's affidavit (attached to Plaintiff's motion) reveals, however, that Burnett was not incarcerated in the TCCJ until twelve days after Hooper was transferred to LARC. Moreover, unlike Hooper, Burnett received a PPD skin test and, although he tested negative for tuberculosis, three inmates in his cell tested positive for tuberculosis. (Doc. #44.)

The Defendants have objected to Hooper's motion and argue that Burnett's claims are based on entirely different facts than are Hooper's claims. They also argue that the joinder of Burnett would cause considerable expense and delay for the Defendants because an entirely new investigation would be required. (Doc. #46.)

In his reply, Hooper challenges Defendants' response and requests the Court to consider, in the alternative, the consolidation of the present action with a separate action on behalf of Burnett. In connection with the latter request, Hooper asks the Court to order the filing of Burnett's supplemental complaint as a separate action and to issue summons. (Doc. #56.)

After carefully considering the record in this case, the Court concludes that Hooper's motion for joinder and for leave to file the supplemental complaint should be denied. The permissive joinder of a plaintiff is governed by Fed. R. Civ. P. 20(a). That Rule plainly dictates two independent prerequisites for permissive joinder: a right to relief arising from a single occurrence or

series of occurrences and a common question of law or fact. Even if the joinder of Burnett were permissive, the Court exercises its discretion to deny that request in this case where Hooper and Burnett are both inmates proceeding pro se. It has been the experience of this Court that cases involving multiple plaintiffs present numerous obstacle for the inmates themselves. Generally inmates are disciplined for having in their possession pleadings with another inmate's name or for corresponding with other inmates. Moreover, as Hooper is proceeding pro se, he cannot represent Burnett in this action. See Fed. R. Civ. P. 11.

Accordingly, after weighing Hooper's and Burnett's right of access to the courts and the policies of the DOC regarding legal mail and multi-plaintiff litigation, the Court concludes that it would be in the best interest of justice if Burnett would file a separate action alleging the violation of his own constitutional rights. The Court will consider consolidating the present action with Burnett's case upon filing of a proper motion in Burnett's case.

III. CONCLUSION

The motion for summary judgment of Defendants Stanley Glanz, Bill Thompson, Brian Edwards, Lewis Harris, John Selph, Robert N. Dick, and John Doe (doc. #12) is **denied** as to any claims for deliberate exposure to active tuberculosis alleged against these Defendants in their official capacities and against Defendants Stanley Glanz, Bill Thompson, Brian Edwards, in their individual

capacities. Defendants Lewis Harris, John Selph, and Robert N. Dick are entitled to judgment as a matter of law as to any claims alleged against them in their individual capacities and their motion for summary judgment (doc. #12) is **granted** in that respect. Defendants Stanley Glanz, Bill Thompson, Brian Edwards, Lewis Harris, John Selph, Robert N. Dick, and John Doe are also entitled to judgment as a matter of law as to any request for punitive damages against these Defendants in their official capacities and their motion for summary judgment (doc. #12) is **granted** in that respect as well.

The motion for summary judgment of Defendant Russel Lewis (doc. #16) and the cross motion for summary judgment of Plaintiff James Scott Hooper (doc. #25-2) are **denied**.

Plaintiff James Scott Hooper's motion for leave to amend the complaint (docs. #40 and #54-2) is **denied** as to his request for leave to amend the complaint to add Walter J. Schriver, Jimmie Allie, John Doe "C," and Jane Doe "D" as defendants, and as to his request for leave to amend the complaint to allege claim one, claim two sub-part "b", claim three sub-parts "b" and "c," claim four, and claim ten. Otherwise, Plaintiff's motion for leave to amend (docs. #40 and 54-2) is **granted** and the Clerk shall **file** Plaintiff's second amended complaint. Plaintiff is **granted** leave to exceed page limitation (doc. #54-3).

Plaintiff's motions to stay, to commence discovery, to join Stephen Craig Burnett as a plaintiff, and for leave to file a supplemental complaint on behalf of Burnett (docs. #25-1, #27, #44-

1, #44-2, and #54-1) are **denied**.

The State of Oklahoma is **dismissed with prejudice** as a defendant in this case.

The Clerk shall **return** to Plaintiff the supplemental complaint of Burnett and all copies of the supplemental complaint, summons, and marshal forms. Although Plaintiff has requested, in the alternative, that Burnett's supplemental complaint be filed as a separate action, the Court declines to do so at this time. The supplemental complaint reflects that Plaintiff and Burnett are both plaintiffs, although that is not the case. Moreover, Burnett has not signed the marshal forms and his name is not even listed on the forms.

The Clerk shall **mail** to Stephen Craig Burnett, #224242, Oklahoma State Penitentiary, P.O. Box 97, McAlester, OK 74502, a copy of this order, some civil rights complaint forms, summons, and marshal forms.

The Court will be setting scheduling deadlines. See Fed. R. Civ. P. 16.

SO ORDERED THIS 18TH day of APRIL, 1995.


Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FIRST FINANCIAL INSURANCE
COMPANY, an Illinois
corporation,

Plaintiff,

v.

DEVLIN WAYNE FIELDS and JAC
INCORPORATED, an Oklahoma
corporation, d/b/a DENIM &
DIAMONDS,

Defendants.

No. 94 C 677 K

FILED

APR 19 1995

Richard M. Ladd, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED IN DOCKET
DATE APR 19 1995

APR 19 1995

JUDGMENT

The matter comes on before the Court this 13th day of April, 1995, for Pretrial Hearing and for consideration of the Plaintiff's request for declaratory judgment with respect to its duty to defend and/or indemnify JAC Incorporated, an Oklahoma corporation, d/b/a Denim & Diamonds, under a policy of insurance and by reason of a claim asserted by the co-Defendant, Devlin Wayne Fields.

The Court finds that notice of this hearing was served by certified mail upon all parties required to receive said notice.

The Court has reviewed all pleadings filed herein, including the judgment of default entered herein on the 22nd day of December, 1994, filed December 23, 1994, and entered on the judgment docket December 27, 1994, the Stipulation of the Plaintiff and Defendant, Devlin Wayne Fields, and the policy of insurance which forms the basis for the Plaintiff's claim for declaratory relief.

Based upon its review of the Court file and all the matters set forth hereinabove or hereafter, the Court finds:

1. By reason of the terms, conditions and exclusions of the

policy of insurance issued by the Plaintiff, the pleadings filed herein including the Stipulation of the Plaintiff and the Defendant, Devlin Wayne Fields, the Plaintiff has no obligation or duty under its policy of insurance to defend or indemnify JAC Incorporated, an Oklahoma corporation, d/b/a Denim & Diamonds, against the claims of the co-Defendant, Devlin Wayne Fields, asserted in case No. 93-C-184 filed in the United States District Court for the Northern District of Oklahoma captioned Devlin Wayne Fields, an individual v. JAC Incorporated, a corporation, d/b/a Denim & Diamonds.

2. The declaratory judgment sought by the Plaintiff as against the Defendants should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff, First Financial Insurance Company, has no liability under the referenced policy to the Defendant, Devlin Wayne Fields.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that First Financial Insurance Company is not obligated or required to defend or indemnify JAC Incorporated, d/b/a Denim & Diamonds in the lawsuit brought against JAC by Devlin Wayne Fields because the claims asserted therein are excluded under the terms and conditions of said policy of insurance.

§/ TERRY C. KERN

Terry C. Kern, United States
District Judge

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APR 19 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CONSTANCE S. MAYOZA,

Plaintiff,

v.

DR. JAMES MAYOZA,

Defendant.

Court No: 94-C-868-K

ENTERED ON DOCKET

DATE APR 19 1995

ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE

This matter comes on for consideration upon the Motion to Dismiss Without Prejudice filed by Plaintiff, Constance S. Mayoza, without objection by Defendant, Dr. James Mayoza. Upon review of said Motion, same is hereby granted.

IT IS SO ORDERED this 18 day of April,
1995.


JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 19 1995

FILED

APR 18 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

MALONEY-CRAWFORD, INC.,

Plaintiff,

V.

EXXON CORPORATION D/B/A
EXXON COMPANY, U.S.A.,

Defendant.

CASE NO. 94-C-42-K

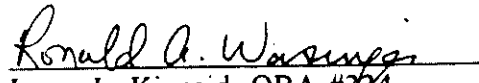
STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Maloney-Crawford, Inc., and Defendant, Exxon Corporation, pursuant to Fed. R. Civ. P. 41(a)(1) hereby stipulate that the above-captioned action is dismissed with prejudice with each party to bear its own costs and attorney's fees.

Respectfully submitted,



Claire V. Eagan, OBA #554
Michael T. Keester, OBA #10869
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 S. Boston, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0400



James L. Kincaid, OBA #374
Ronald A. Wasinger, OBA #15869
CROWE & DUNLEVY
321 S. Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 592-9800

ENTERED ON DOCKET

DATE APR 19 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 18 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

KIP W. SYLVESTER,

Plaintiff,

vs.

No. 94-C-1170-K

LEXINGTON CORRECTIONAL
CENTER, et al.,

Defendants.

FILED

APR 19 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff, a state prisoner appearing pro se and in forma pauperis, filed this action on December 20, 1994, pursuant to 42 U.S.C. § 1983, requesting an injunction preventing prison officials from cutting his hair upon his reception at the Lexington Assessment and Reception Center (LARC). Plaintiff neither filed a motion for a temporary restraining order nor a motion for preliminary injunctive relief at the time of filing of this action, and on January 17, 1995, Plaintiff's hair was cut upon his arrival at LARC pursuant to Policy No. LAR-090126-01 that "[u]pon reception at the Lexington Assessment and Reception Center . . . [h]air will be cut, to a maximum of one (1) inch in length and all facial hair removed by appropriate method including shaving, depilatory or clippers." (Ex. A attached to Defendants' motion to dismiss or for summary judgment, doc. #8.)

LARC has moved to dismiss for failure to state a claim, or in the alternative for summary judgment, on the ground that this action no longer presents a justiciable controversy, and therefore, that Plaintiff's claim is now moot. The Oklahoma Department of

Corrections (DOC) has instead moved to quash service. Plaintiff has failed to respond to either motion.

Plaintiff's failure to respond to Defendants' motions constitutes a waiver of objection to the motions, and a confession of the matters raised by the motions. See Local Rule 7.1.C.¹ In any event, the Court concludes that Plaintiff's request for injunctive relief is now moot because he is no longer subject to the condition about which he complains in this action. See Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985). In addition because the Grooming Code has been rescinded, there is no danger that Plaintiff's hair will be cut again.² City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (to obtain injunctive relief a plaintiff must show that there is a real or immediate threat that he will be wronged again). Accordingly, LARC's motion for summary judgment should be granted in that the pleadings show that there remain no genuine issues of material fact and that LARC is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

The Court also concludes that Plaintiff has failed to properly serve the DOC and therefore that any claims against the DOC must be

¹Local Rule 7.1.C reads as follows:


Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

²On July 1, 1994, the DOC adopted a Personal Hygiene and Appearance Code which provides that after the initial reception process an inmate can grow his hair as long as it complies with that Code.

dismissed under Fed. R. Civ. 12(b)(4) and (5).

ACCORDINGLY, IT IS HEREBY ORDERED that LARC' motion for summary judgment (doc. #8) is **granted**; that the motion to quash service of summons upon the DOC (doc. #5) is **granted**; and that the DOC is **dismissed** as a party in this case. The Court will enter judgment in favor of LARC.

SO ORDERED THIS 18 day of April, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

4-13-95

ENTERED ON DOCKET
DATE APR 19 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 18 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

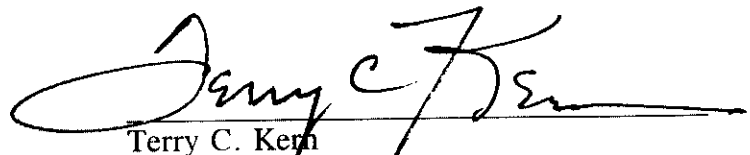
FRANK TAUCHER and MARKET)
MOVEMENTS, INC.,)
)
Plaintiffs,)
)
vs.)
)
ALEXANDER ELDER and FINANCIAL)
TRADING SEMINARS, INC.,)
)
Defendants.)

Case No. 94-C-457-K

JUDGMENT AWARDING ATTORNEY'S FEES

Comes on for consideration this 17 day of April, 1995,
Defendants' request for entry of a Judgment to reflect the Order entered by this Court on March
15, 1995, filed of record on March 16, 1995, and for good cause shown:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants
Alexander Elder and Financial Trading Seminars, Inc. shall have and are hereby awarded a
judgment against the Plaintiffs Frank Taucher and Market Movement, Inc., jointly and severally,
for attorneys fees in this action in the amount of Three Thousand Three Hundred Seventy
Dollars and no/cents (\$3,370.00).


Terry C. Kern
United States District Judge

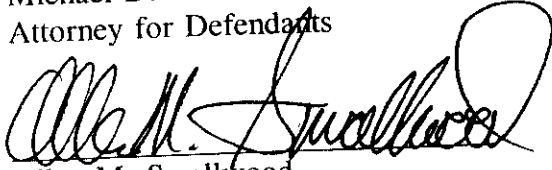
APPROVED AS TO FORM:



Steven M. Harris

Michael D. Davis

Attorney for Defendants



Allen M. Smallwood

Attorney for Plaintiffs

709-2.009:nw

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE APR 18 1995

BASSAM AL-RIFAI,

Plaintiff,

v.

GENERAL MOTORS ACCEPTANCE
CORPORATION, a foreign
corporation, and MID-CENTURY
INSURANCE COMPANY, a foreign
corporation,

Defendants.

CASE NO. 94-C-836-B

FILED

APR 17 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes on for consideration of Defendant Mid-Century Insurance Company's (Mid-Century) Supplemental Motion to Dismiss Or In The Alternative For Summary Judgment. (docket entry # 7.

Mid-Century seeks to dismiss, or in the alternative be granted summary judgment, based upon a "Release In Full of all Claims and Rights" signed by Plaintiff. Plaintiff, in his response thereto, acknowledges that the Release was executed by him but asserts that said Release released only Defendant Mid-Century from liability herein.

It appears to the Court that Mid-Century's motion was addressed only to the issue of its liability and did not address the putative liability of Defendant General Motors Acceptance Corporation (GMAC). GMAC has filed no similar motion herein.

The Court concludes Defendant Mid-Century's Motion should be and the same is herewith **GRANTED**. Accordingly, Mid-Century is

dismissed as a party herein.

IT IS SO ORDERED this 17th day of April, 1995.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE APR 18 1995

FILED

APR 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES E. GILES,

Plaintiff,

vs.

YMCA OF GREATER TULSA and
JOHN W. SWIFT, an individual,

Defendants.

No. 94-C-661-B

J U D G M E N T

In keeping with the Findings of Fact and Conclusions of Law entered this date, Judgment is hereby entered in favor of the YMCA of Greater Tulsa and against the Plaintiff, James E. Giles, with the Plaintiff to take nothing and his action to be hereby dismissed. Costs, if timely sought pursuant to Local Rule 54.1, are hereby granted to the Defendant and against the Plaintiff; and the parties are to pay their own respective attorney's fees.

DATED this 17th day of April, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
APR 18 1995

DATE
FILED

APR 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES E. GILES,

Plaintiff,

vs.

YMCA OF GREATER TULSA and
JOHN W. SWIFT, an individual,

Defendants.

No. 94-C-661-B

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This alleged age discrimination in employment case was tried to the Court without a jury on March 21 and 23, 1995. The action had been previously dismissed as to John W. Swift and proceeded against YMCA of Greater Tulsa only. After considering the evidence presented, the applicable legal authority, and arguments of counsel, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Plaintiff, James E. Giles ("Giles"), at applicable times, was a 54-year old male residing in Tulsa County, Oklahoma, first employed as a Senior Program Director of the Thornton branch of the Tulsa Metropolitan YMCA on July 17, 1989, in Tulsa, Oklahoma. Giles was employed by the Executive Director of the Thornton Branch, who had previously worked with Giles at the Bartlesville, Oklahoma YMCA.

2. On July 7, 1993, John R. Swift ("Swift"), the Chief Executive Officer of the YMCA, terminated Giles' employment, at

which time Giles was Associate Director of the Thornton YMCA. Giles was an at-will employee.

3. Within 180 days Giles filed an Age Discrimination in Employment claim with the Equal Employment Opportunity Commission asserting the following:

"On or about May 15, 1993, I was denied promotion to the position of Executive Director of the Thornton Family Branch and on July 7, 1993, I was discharged from the position of Associate Executive Director of the Thornton Family Branch." (DX-27).

4. More than 60 days elapsed from the filing of the charges with the EEOC and the filing of the Plaintiff's complaint herein on July 1, 1994.

5. Swift was employed as Chief Executive Officer of the YMCA of Greater Tulsa in August 1991. He was charged by the Board of Directors of the YMCA of Greater Tulsa, which consisted of numerous branches, to make the necessary changes to get the Tulsa YMCA operating in the black (from its previous deficit position); which included providing the leadership to make the necessary programmatic, personnel and increasing membership decisions to accomplish the goal.

6. As Swift undertook his duties as Chief Executive Officer of the YMCA of Greater Tulsa, having come from many years of experience in supervisory positions with other YMCAs, he found resistance to his management style and views of what needed to be done to carry out the Board of Directors charge. This resistance at the Thornton Branch of the YMCA of Tulsa Greater came from its long-time executive director as well as from the Plaintiff who had

strong disagreements with the management style and proposed changes of Swift. The Executive Director of the Thornton Branch had been passed over in his application for Chief Executive Officer of the YMCA of Greater Tulsa when Swift was selected. Swift's take-charge manner and occasional personality clashes caused friction with the principal Thornton branch staff members, including Plaintiff, from the beginning. This stemmed from Swift's belief that the Thornton Family Branch of the Greater Tulsa YMCA was not living up to its potential so he was suggesting program changes and methods to increase its membership and in turn income.

7. Swift thought and occasionally opined that it was the older staff members, present when he arrived, that were causing internal dissension to his leadership. The older staff members had for years done satisfactory work in the Tulsa YMCA but they were clearly at odds with the new Swift management style and methods of achieving the Board-charged goals.

8. Although the YMCAs over the country are autonomous, their commitment to christian family programs and values are the same. Experienced staff members committed to community YMCA organizations and purposes over the country often transfer from one YMCA community organization to another and in the process move up to supervisory positions and then to director or CEO positions toward achieving career goals if they have demonstrated abilities.

9. Swift thought Giles should move to another YMCA to gain more experience to ultimately be a director or CEO. Swift agreed to promote Giles from senior program director beneath the executive

director of the Thornton Branch to that of associate executive director so Giles' personal dossier would be more attractive to other potential YMCA employers to whom he might apply.

10. The Executive Director of the Thornton Family YMCA Branch in Tulsa took early retirement. For a while, starting in April 1993, Swift appointed himself executive director of the Thornton YMCA pending the search for a new executive director. Giles applied for the job but was not chosen by the selection committee to be among the eight applicants that were selected as finalists. The finalist who was employed as the executive director of the Thornton Family YMCA Branch, age 46 years, concluded early on that he did not want Giles on his staff. He and Swift concluded that it was not necessary to replace Giles but that Giles' various duties could be spread among other existing staff members who were younger than Giles. Therefore, Swift terminated Giles on July 7, 1993, but permitted him to remain on temporarily for about three weeks on a hourly basis in charge of the Thornton Branch softball program that Giles was supervising. At the time Swift terminated Giles he stated that Giles' management style did not fit into the future of the YMCA. (DX-10).

11. Giles "circulated his papers" and was employed by the Cabool, Missouri YMCA on September 1, 1993, at a salary of approximately \$1,300.00 annually more than he was paid as associate executive director of the Thornton Branch. Giles' benefits package at the Thornton Branch was better but the increase in salary, for practical purposes, essentially offset the difference.

12. The Court concludes that age discrimination was not a substantial motivating factor in Swift's decision to terminate Giles.

13. In reference to Giles' wife's temporary employment and employee number, the evidence did not reflect that Giles had any involvement in assigning her a new employee number in order to reduce her mandatory percentage of payment to the employee retirement fund.

14. The evidence demonstrated that under Swift's direction as CEO of the YMCA of Greater Tulsa, it has increased in membership and operated in the black.

CONCLUSIONS OF LAW

1. This action arises under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, and the Court has appropriate subject matter jurisdiction pursuant to 29 U.S.C. § 626(c)(1) (1985).

2. The Court has appropriate venue pursuant to 28 U.S.C. § 1391(b) and 29 U.S.C. § 1132(e)(2).

3. Any Finding of Fact above which might be properly characterized a Conclusion of Law is incorporated herein.

4. To establish a *prima facie* case of age discrimination regarding discharge in employment, the Plaintiff must establish the following: (1) that he is within the protected age group; (2) that he was doing satisfactory work; (3) that he was discharged; and (4) that his position was filled by a younger person. Lucas v. Dover, 857 F.2d 1397 (10th Cir. 1988), and Denison v. Swaco Geolograph

Co., Inc., 941 F.2d 1416 (10th Cir. 1991).

5. The Plaintiff failed to demonstrate by a preponderance of the evidence that "a discriminatory reason more likely motivated the employer or ... that the employer's proffered explanation is unworthy of credence." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095 (1981); MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115, 1121-1122 (10th Cir. 1991).

6. The YMCA established a legitimate business reason for terminating Plaintiff since it was reorganizing the management structure at the Thornton Branch and because Plaintiff's style did not fit in with the new structure. This is essentially because the YMCA was changing from a program-based management philosophy to a membership-based management philosophy and such, along with the differences of opinions of the Plaintiff and John W. Swift, as well as the new executive director of the Thornton Branch, served as legitimate nondiscriminatory reasons for Plaintiff's termination.

7. The YMCA of Greater Tulsa, did not violate the ADEA in bringing about Plaintiff's employment termination.

8. The Court finds that contemporaneous herewith a Judgment should be entered in favor of the Defendant, YMCA of Greater Tulsa, and against the Plaintiff, James E. Giles.

IT IS SO ORDERED this 17 day of April, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
APR 17 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

WILTEL, INC., a Delaware
corporation,

Plaintiff,

vs.

CONSORTIUM 2000, INC., a
California corporation,

Defendant.

Case No. 94-C-1010-BU

ENTERED ON DOCKET
DATE APR 18 1995

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 45 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 17 day of April, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

COPY

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APR 17 1995

PIPING COMPANIES, INC.,

Plaintiff,

vs.

LIBERTY MUTUAL INSURANCE
COMPANY,

Defendant.

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-1097BU

ENTERED ON DOCKET

DATE APR 18 1995

ORDER OF DISMISSAL WITH PREJUDICE

On this 17 day of April, 1995, the Court, having considered the Joint Application of the parties for dismissal with prejudice, FINDS that this case should be and is hereby dismissed with prejudice to the bringing of any further action. The parties shall bear their own costs and attorney fees.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED FOR ENTRY:

DOERNER, SAUNDERS, DANIEL & ANDERSON

By: 

Richard P. Hix, OBA No. 4241
Steven K. Metcalf, OBA No. 14780
320 South Boston Avenue, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211

Attorneys for Plaintiff,
Piping Companies, Inc.

BAKER, BAKER & TAIT

By: 

Robert S. Baker, OBA No. 457
Gary F. Duckworth, OBA No. 2508
2140 Liberty Tower
100 North Broadway
Oklahoma City, Oklahoma 73102
(405) 232-3487

Attorneys for Defendant,
Liberty Mutual Insurance Company

FILED

APR 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

ANGELA HOUSER-YOST,
Plaintiff,

vs.

LIBERTY BANCORP, INC.
Defendant.

Case No. 94-C-1096B ENTERED ON DOCKET
DATE APR 18 1995

ORDER

UPON Defendant's Motion to ~~Deem~~ Matter Confessed, and good cause having been shown,

IT IS ORDERED, ADJUDGED AND DECREED that Defendant's Motion is granted and Plaintiff's request for jury trial is denied.

Entered this 17th day of April, 1995 at _____ a.m./p.m.

S/ THOMAS R. BRETT

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 17 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

LUCILLE M. POWDRILL,

Plaintiff,

vs.

DONNA SHALALA,
Secretary of Health and
Human Services,

Defendant.

ENTERED ON DOCKET

DATE APR 18 1995

Case No. 93-C-1085-B

ORDER AND JUDGMENT

This matter comes on for consideration of Plaintiff's Motion For Attorney Fees (docket entry # 17).

Plaintiff seeks attorney fees pursuant to 28 U.S.C. § 2412(d), the Equal Access To Justice Act. In enacting such act the Congress sought to remove the financial barrier faced by individuals litigating valid claims against the government. The award of attorney fees to prevailing parties was intended to overcome the harsh reality that in many cases it was "more practical to endure an injustice than to contest it." H.R.Rep. No. 1418, 96th Cong. 2nd Sess.9, reprinted in 1980 U.S.Code Cong.& Ad.News, 4953, 4984, 4988.

Plaintiff's attorney Paul F. McTighe, Jr. seeks attorney fees in the amount of \$2,256.25 plus incidental costs of \$7.10 for a total of \$2,263.35. Defendant has entered her response herein,

stating she has no objection to the Court approving an attorney fee in such amount.

Therefore, the Court concludes Plaintiff's Motion should be and the same is hereby GRANTED. Plaintiff's attorney Paul F. McTighe, Jr. is awarded an attorney fee of \$2,256.25 plus incidental costs of \$7.10 for a total of \$2,263.35.

IT IS SO ORDERED THIS 17th DAY OF April, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 17 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SOLAN CARL SCOTT,
Plaintiff,
vs.
STANLEY GLANZ,
Defendant.

No. 94-C-1072-BU

ENTERED ON DOCKET
DATE APR 18 1995

ORDER

Plaintiff, a state prisoner appearing pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983, alleging that his constitutional rights were violated when some of his mail was improperly handled, discarded without authorization, and never delivered. Plaintiff further alleges that the "mail is not [always] passed out on a daily basis thereby denying [him] the right to properly carry on [his] legal, personal and business affairs."

Defendant has moved to dismiss this case as frivolous on the basis of the court-ordered Martinez report. See Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Worley v. Sharp, 724 F.2d 862 (10th Cir. 1983). Plaintiff has failed to respond.

Plaintiff's failure to respond to Defendant's motion to dismiss constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ In any event the Court concludes that this case is

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within

frivolous and should therefore be dismissed under 28 U.S.C. § 1915(d).

Section 1915(d) is intended to discourage filing of baseless suits which would not generally be initiated by paying litigants. Neitzke v. Williams, 490 U.S. 319, 327 (1989). "The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke, 490 U.S. at 325). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A fanciful factual allegation would be one which is clearly baseless, fantastic, or delusional. Id. In determining whether a suit is frivolous, this court must weigh the allegations in favor of the plaintiff. Denton v. Hernandez, 112 S.Ct. 1728, 1733 (1992).


Plaintiff's general conclusions are too vague and conclusory to be sufficient to state a claim arguably based in law or fact. See Frazier v. Dubois, 922 F.2d 560, 562 n.1 (10th Cir. 1990). The Tulsa County Jail follows specific procedures in handling prisoner's incoming and outgoing mail. (Ex. E attached to the

fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

Special Report.) Moreover, the "Mail Log," attached as exhibit "G" to the Special Report, refutes the allegation that Plaintiff did not receive correspondence during the period in question.

ACCORDINGLY, IT IS ORDERED that Defendant Stanley Glanz's motion to dismiss this case as frivolous (doc. #6) is **granted** and this case is hereby **dismissed**.

SO ORDERED THIS 17 day of April, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 17 1995 R

WILBUR THOMPSON,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 94-C-1162-BU

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 18 1995.

ORDER

Before the Court is Respondent's motion to dismiss this habeas corpus action for failure to exhaust state remedies. (Doc. #5.) Petitioner has not responded even though the Court granted him a fifteen-day extension of time on March 16, 1995.


The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that Petitioner has not exhausted all the various grounds for relief he has alleged.

Moreover, Petitioner's failure to object to Respondent's motion to dismiss constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.

Accordingly, Respondent's motion to dismiss (docket #5) is granted and the petition for a writ of habeas corpus is hereby dismissed without prejudice.

IT IS SO ORDERED this 17 day of April, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 14 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

GEORGE WASHINGTON,
Plaintiff,

vs.

No. 94-C-1109-B

TULSA BOARD OF COUNTY
COMMISSIONERS, et al.,
Defendants.

ENTERED ON DOCKET

DATE APR 17 1995

ORDER

Before the Court is Defendant City of Tulsa's motion to dismiss filed on March 27, 1995. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ In any event, the Court concludes that the City of Tulsa was not involved in the alleged failure to conduct a competency hearing pursuant to 22 O.S. § 1175 et seq.

ACCORDINGLY, IT IS HEREBY ORDERED that:

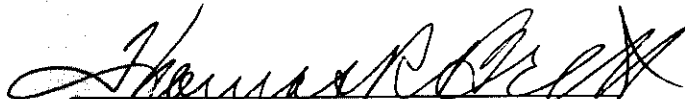
- (1) The motion to dismiss of the City of Tulsa (doc. #6) is **granted**;
- (2) The Board of County Commissioners and the County of Tulsa are **dismissed** for lack of service; and

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

(2) Plaintiff's motion for a special report and to produce mental records (doc. #5) is denied.

SO ORDERED THIS 14 day of Apr., 1995.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 14 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

MARION McDANIEL,

Petitioner,

vs.

L.L. YOUNG,

Respondent.

No. 94-C-249-B ✓

ENTERED ON DOCK

DATE APR 17 1995

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges the judgment and sentence of the District Court of Osage County in Case No. CRF-9-89-175 in which a jury found him guilty of two counts of Unlawful Delivery of Controlled Drugs in February 1990. The trial court sentenced Petitioner to ten years imprisonment on each count with the sentences to run consecutively. On appeal Petitioner raised the same issue which he raises in this petition--i.e. that prosecutorial misconduct occurred when reference to an uncharged drug related homicide was made during cross examination.¹ (Petition, doc. #1, at 6.) The Oklahoma Court of Criminal Appeals affirmed the conviction.

Respondent has filed a Rule 5 Response to which Petitioner has not replied. The petition for a writ of habeas corpus is therefore at issue before the Court at this time.

¹The Court liberally presumes as did the Respondent in this case, that Petitioner is referring to the same "comments" which he challenged on direct appeal.

In analyzing "whether a petitioner is entitled to federal habeas relief for prosecutorial misconduct, [a federal habeas court] must [] determine whether there was a violation of the criminal defendant's federal constitutional rights which so infected the trial with unfairness as to make the resulting conviction a denial of due process." Fero v. Kerby, 39 F.3d 1462, 1473 (10th Cir. 1994) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)); see also Coleman v. Saffle, 869 F.2d 1377, 1395 (10th Cir. 1989), cert. denied, 494 U.S. 1090 (1990). The factors considered in this due process analysis are: (1) the strength of the state's case; (2) whether the judge gave curative instructions regarding the misconduct; and, (3) the probable effect of the conduct on the jury's deliberative process. Hopkinson v. Shillinger, 866 F.2d 1185, 1210 (10th Cir. 1989), cert. denied, 497 U.S. 1010 (1990).

The comments at issue in this case are as follows:

Q. (By Mr. Stuart) You know Lee Eaton?

A. Yes, sir.

Q. Or should I say did you know him?

A. Yes, sir, he was a very good friend.

Q. Who gave Lee Eaton the drugs he took the night he died?

MR. HALL: Your Honor, I need to object. That is totally irrelevant. That's away from the issue in this case.

THE COURT: Not only that but it's outside the direct examination, sustained.

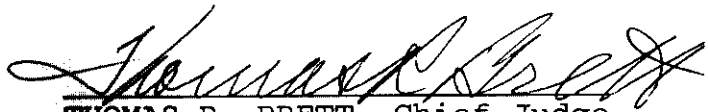
Ladies and Gentlemen of the Jury, you will totally ignore that question. It's improper.

(Tr. at 303, attached to the response, doc. #3.)

The Court cannot conclude that the above comments individually or in summation constitute prosecutorial misconduct. At any rate, in the context of the entire trial and in light of the curative instruction given by the court, the Court finds that the comments about an uncharged, drug-related homicide do not appear to be "so prejudicial" that they render the trial "fundamentally unfair."

Accordingly, the petition for a writ of habeas corpus is hereby **denied**.

SO ORDERED THIS 14 day of aps, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 4 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

HERMAN E. MACK,
Plaintiff,

v.

JULIE O'CONNELL, et al.,
Defendants.

Case No. 95-C-24-B

EOD: 4-17-95

ORDER

Before the Court is Defendant Julie O'Connell's motion to dismiss for failure to state a claim, filed on February 21, 1995. Plaintiff, an inmate proceeding pro se and in forma pauperis, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ In any event the Court concludes that Plaintiff has failed to show that Ms. O'Connell, his appointed public defender, acted under color of state law for purposes of this civil action under 42 U.S.C. § 1983. It is well established that "the conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per

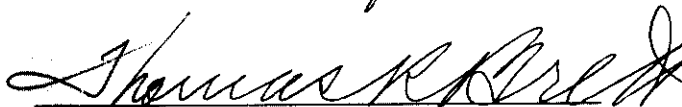
¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

curiam); see also Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 266 (10th Cir. 1994). Cf., Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)) (public defender does not act under color of state law when representing an indigent defendant in a state criminal proceeding). Moreover, Plaintiff has not alleged any grounds for the exercise of diversity jurisdiction in this case. See Lemmons, slip op. at 3.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant O'Connell's motion to dismiss (doc. #4) be **granted** and that she be **dismissed** as a Defendant in this case. **The Court also dismisses** Defendant Stanley Glanz for failure to **serve** and lack of prosecution.

SO ORDERED THIS 14 day of April, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 14 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JOHN D. HUDAK,

Petitioner,

vs.

BOBBY BOONE,

Respondent.

No. 93-C-1044-B

ENTERED ON DOCKET
DATE APR 17 1995

ORDER

Petitioner's claims of ineffective assistance of counsel are now before the Court for consideration.¹ In its December 2, 1994 order, the Court liberally construed Petitioner's claim to allege the following grounds of ineffective assistance of counsel: (1) that counsel refused to investigate two prior incidents of tire slashing which the prosecutor allegedly relied on to request a fifteen-year sentence; (2) that counsel never requested a plea bargain; and (3) that counsel did not fully advise Petitioner about his option of going to trial, and only stressed the option of pleading guilty. Respondent has submitted a supplemental response to which Petitioner has replied.

To establish ineffective assistance of counsel on a counseled guilty plea, Petitioner must show that his counsel's performance was deficient and that there is "a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59

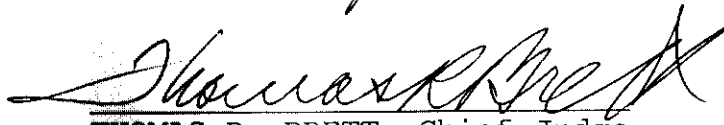
¹The Court has previously denied as procedurally barred Petitioner's claims relating to the alleged unconstitutional search and seizure and the lack of probable cause to stop.

(1985); Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). "The performance inquiry is made with deference to counsel's assistance, but in recognition that the validity of a guilty plea depends upon a defendant's knowing and voluntary choice among alternatives. Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991) (citing Hill, 474 U.S. at 56, and Strickland, 466 U.S. at 688).

In the instant case, even if counsel's conduct and advice fell below a standard of reasonably effective assistance, Petitioner has failed to allege and establish the kind of "prejudice" necessary to satisfy the second prong of the Strickland test. Although Petitioner argues that his counsel did not fully explain his right to a jury trial, Petitioner nowhere alleges that but for counsel's errors he would have insisted on going to trial. The fact that Petitioner received a higher sentence than he had desired or had been promised by his attorney does not suffice to establish that his counsel's conduct or advice amounted to ineffective assistance under the Sixth Amendment. Therefore, Petitioner is not entitled to habeas corpus relief on his third ground of error.

ACCORDINGLY, IT IS HEREBY ORDERED that the Petition for a writ of habeas corpus is denied.

SO ORDERED THIS 14 day of April, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
APR 14 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

KEENAN DEON WHITE, SR.,)

Plaintiff,)

vs.)

STANLEY GLANZ, et al.,)

Defendants.)

No. 94-C-1176-B

ENTERED 1995

DATE APR 17 1995

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on February 13, 1995. Defendants contend that Plaintiff's action is barred by the two-year statute of limitations and is not saved by the provisions of 12 O.S. § 100. Plaintiff, represented by counsel, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ In any event, the Court concludes that Plaintiff cannot revive his action under the "savings provisions" of section 100 because the applicable statute of limitations had not yet run when Plaintiff voluntarily dismissed his original action on December 22, 1993. Only "where a timely commenced action is dismissed without prejudice on plaintiff's motion before trial on the merits but

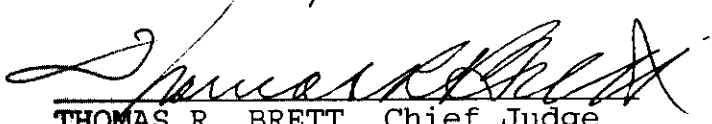
¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

after the statute of limitations has run, the plaintiff may commence a new action within a year after such dismissal.'" See Brown v. Hartshorne Public School District #1, 926 F.2d 959, 962 (10th Cir. 1991) (quoting In re Speake, 743 P.2d 648, 650 n.3 (Okla. 1987)).

ACCORDINGLY, IT IS ORDERED that Defendants' motion to dismiss (doc. #5) is **granted** and this action is hereby **dismissed with prejudice**.

SO ORDERED THIS 14 day of apr, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 14 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ROBERT L. LOWTHER,
Petitioner,

vs.

No. 94-C-762-B

MIKE CARR, et al.,
Respondent.

ENTERED ON DOCK

DATE APR 17 1995

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, a state prisoner currently confined at the Rogers County Jail, brings this habeas corpus action challenging his conviction in Rogers County Case No. CRF-84-73 on the ground of a ten-year delay in the processing of his direct criminal appeal.

On November 4, 1994, Respondents moved to dismiss this action for failure to exhaust state remedies. (Docs. #7 and #8.) On December 8, 1994, Respondents moved to supplement and to dismiss for mootness in that the Oklahoma Court of Criminal Appeals had reversed Petitioner's conviction in CRF-84-73 and remanded the case for a new trial. (Doc. #10.) On January 19, 1995, this Court denied Respondent's motions to dismiss and concluded that Petitioner was entitled to a ruling on his claim that the appellate delay violated his due process rights.¹ (Doc. #12.) The Court

¹The Court determined that Petitioner had fully exhausted his state remedies and that Petitioner's due process claim as a result of inordinate delay was not moot because the Court of Criminal Appeals had not reversed the conviction with prejudice to retrial. Harris v. Champion, 15 F.3d 1538, 1566 (10th Cir. 1994) (holding that a petitioner whose conviction the state court reversed with

then granted Petitioner fifteen days to submit any arguments in support of his claim that the delay in adjudicating his direct criminal appeal violated his substantive due process rights. Both parties have submitted briefs and the due process claim is now before the Court for consideration.

In the meanwhile, the District Court for Rogers County appointed counsel for Petitioner and set Case No. CRF-84-73 for a new trial on April 3, 1995. Although the trial has since been continued to the May 15, 1995 docket, Petitioner has moved for an emergency injunction, asking this Court to prevent Rogers County from retrying him for the charges in Case No. CRF-84-73. Respondents have filed a response and that motion is also before the Court for consideration at this time.²

I. BACKGROUND

In this habeas corpus action, Petitioner challenges a sentence which he is scheduled to serve in the future in Case No. CRF-84-73. Petitioner is presently in the custody of the Department of Corrections for rape in the first degree in Tulsa County Case No. CF-92-4021.

Petitioner's sentence in CRF-84-73 was originally imposed on December 19, 1984. Although Petitioner and his counsel gave oral

prejudice to retrial is not entitled to habeas relief).

²On March 21, 1995, the Court notified Petitioner of the recent opinion in Harris v. Champion, ___ F.3d ___, 1995 WL 73732 (10th Cir., Feb. 21, 1995) (No. 93-5191) (Harris III), and granted him an opportunity to consider it and submit a supplemental response. Petitioner has not responded.

notice of his intent to appeal, no written notice of intent to appeal was ever filed. At the hearing on his motion for new trial on January 17, 1985, the trial court appointed the Appellate Public Defender to represent the Petitioner on appeal. However, on March 4, 1985, the Appellate Public Defender returned the records to Rogers County and advised the state judge (1) to reimpose the sentence and order trial counsel to file a written notice of intent to appeal within ten days, or (2) to order trial counsel to request an appeal out of time. (Ex. E attached to doc. #8.) The following hand-written notation appears on the copy of the letter: "Give copy to defense attorney--tell him to rectify. File copy in Ct. file." (Id.)

Petitioner's court file does not reflect any further activity until November of 1989, when Petitioner requested certain documents from the court clerk's office. (Ex. I attached to doc. #8.) In May of 1990, Petitioner filed an application for post-conviction relief in which he raised a denial of his right to a direct appeal. Although the prosecutor filed a response, the record does not reveal any ruling. Petitioner was released on parole on February 22, 1991, and he did not seek an appeal out of time in CRF-84-73 until September 30, 1993, shortly after he was incarcerated for his conviction in CF-92-4021 and his parole was revoked. (Id.)

On May 9, 1994, the Court of Criminal Appeals issued an order granting an appeal out of time. (Ex. M attached to doc. #8.) On October 18, 1994, Petitioner's counsel filed an opening brief requesting the dismissal of the charges because Petitioner's right

to due process of law under Harris v. Champion, 15 F.3d 1538, 1559 (10th Cir. 1994), had been violated by the inordinate delay in his appeal. (Ex. N attached to doc. #8.) On December 5, 1994, the Oklahoma Court of Criminal Appeals remanded Petitioner's case for a new trial because the transcript of the trial and sentencing were not available as they had been lost in a flood. (Ex. A attached to doc. #10.)

II. ANALYSIS

In determining whether inordinate delay in adjudicating Petitioner's direct criminal appeal violated his substantive due process rights, this Court must balance the following factors:

- a. the length of the delay;
- b. the reason for the delay and whether that reason is justified;
- c. whether the petitioner asserted his right to a timely appeal; and
- d. whether the delay prejudiced the petitioner by
 - i. causing the petitioner to suffer oppressive incarceration pending appeal; or
 - ii. causing the petitioner to suffer constitutionally cognizable anxiety and concern awaiting the outcome of his or her appeal; or
 - iii. impairing the petitioner's grounds for appeal or his or her defense in the event of a reversal and retrial.

Harris v. Champion, 15 F.3d 1538, 1559 (10th Cir. 1994) (Harris II). Even though a court is required to balance all four factors, "ordinarily, a petitioner must make some showing on the fourth factor--prejudice--to establish a due process violation." Id.

Prejudice cannot be presumed from delay alone "absent a delay so excessive as to trigger the Doggett presumption of prejudice." Id. at 1565. Only recently, the Tenth Circuit Court of Appeals recognized "that a presumption of such prejudice will arise when delay in adjudicating the appeal attributable to the state exceeds two years." Harris v. Champion, ___ F.3d ___, 1995 WL 73732, at *3 (10th Cir., Feb. 21, 1995) (Harris III).

As in the exhaustion context, this presumption is a rebuttable one. Harris II, 15 F.3d at 1556. Under appropriate circumstances, the district court may apply the more fact specific analysis set forth in Harris II, 15 F.3d at 1554-56, either to find prejudice at an earlier stage or to find the absence of prejudice even under circumstances of substantially greater appellate delay.

Harris III, 1995 WL 73732, at *3.

Petitioner has experienced an overall delay of ten years. The Court cannot overlook, however, that the Court of Criminal Appeals granted Petitioner an appeal out of time on May 9, 1994, only seven months prior to its decision reversing his conviction in CRF-84-73 and remanding the case for a new trial. "When a petitioner has been granted an appeal out of time, the length of the appellate process should be measured from the entry of that order, unless, of course, delay in perfecting the appeal in the first instance is attributable to the State." Harris II, 15 F.3d at 1556 n.9.³ The

³In Harris III, the Tenth Circuit recognized that it is acceptable to "use the same time reference to presume (i) ineffectiveness of state appellate procedures sufficient to excuse exhaustion on the petitioner's underlying claims of unconstitutional trial error, and (ii) prejudice necessary to support an independent constitutional claim of deprivation of an effective direct appeal because of delay." Harris III, 1995 WL 73732, at *3.

Court must therefore determine whether the delay in perfecting Petitioner's appeal in the first instance is attributable to the State.

Respondents do not deny that there is little justification for the delay in this case. They assert, however, "that the record does not support any possible claim that there was an intentional denial of Petitioner's right to a direct appeal," and the Court notes the Petitioner has not alleged any such denial. Respondents further suggest that this case presents "a break down in communication between the trial court and Petitioner's trial counsel." (Respondents' response, doc. #14, at 3.) This Court agrees. Although the trial judge directed the clerk to contact Petitioner's trial counsel to correct the problem, nothing happened. Whether the failure to file the written Notice of Intent to Appeal resulted from negligence of the court clerk, Petitioner's trial counsel, or some other agent, remains unresolved. (Respondents' response, doc. #14, at 3.)

In addition, the instant case presents a scenario completely distinct from the one contemplated in the Harris litigation. Unlike Harris, Petitioner has not experienced inordinate delay because of the increasing caseload of the Appellate Public Defender (presently Oklahoma Indigent Defense System) and/or the Oklahoma Court of Criminal Appeals. Rather Petitioner's appeal has been delayed because of the absence of a written notice of intent to appeal much like Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991), where the Appellate Public Defender's office never received the

state court's order appointing counsel and as a result no notice of intent to appeal was ever filed. Therefore, the State should not be responsible for any of the initial delay in perfecting Petitioner's appeal and prejudice cannot be presumed from delay alone.

Even if the initial delay in perfecting Petitioner's direct appeal is attributable to the State, this Court cannot hold the State responsible for all of the delay in this case. After all, Petitioner did absolutely nothing between March 1985, when the Appellate Public Defender's Office returned the record to the trial judge, and May 1990, when Petitioner filed his first application for post-conviction relief. It is also undisputed that shortly after the filing of his first application, Petitioner was released on parole and a ruling was not rendered until four years later in May 1994, when Petitioner was reincarcerated and again requested an appeal out of time.

Given Petitioner's total disinterest or minimum involvement for almost eight years, from 1986 to late 1993, the State should be responsible for no more than twenty months of the total delay. Therefore, to establish a separate due process violation for the delay, Petitioner "must make a particularized showing of actual prejudice" as a result of the delay. Harris III, ___ F.3d ___ 1995 WL 73723, at *3 (unless the delay is sufficiently excessive to give rise to a presumption of prejudice, the petitioner must make a particularized showing of actual prejudice).

In his supplemental brief, Petitioner focuses on the most

difficult form of prejudice--impairment of a defendant's defenses in the event of a retrial. See Harris II, 15 F.3d at 1564. He alleges as follows:

the Petitioner was prejudice[d] because the Petitioner no longer know[s] the whereabouts of key witness[es] that either testified at his last trial, or that he would have called at a new trial. Further, even if these witnessess [sic] were located the Petitioner would be forced to rely on what the witnesses might remember.

(Doc. #13 at 3.)⁴

While Petitioner need only make a colorable showing of prejudice, see Harris II, 15 F.3d at 1565 (recognizing that a petitioner will not be required to prove prejudice as a result of inordinate delay at the level of a full blown trial), his bare assertions are insufficient to meet that standard and show that he has been prejudiced by the delay. Petitioner neither states the name of the witnesses nor explains how they are material to his defense. Moreover, Petitioner only subpoenaed three state witnesses at his first trial. (Respondent's response, doc. #14 at 4 and f.n. 1.) Lastly, Petitioner is represented by appointed counsel on retrial. If the Petitioner has been prejudiced by loss of witnesses or their memories, his court-appointed counsel will be able to raise the claim and prepare a record in support of the Petitioner's claims.

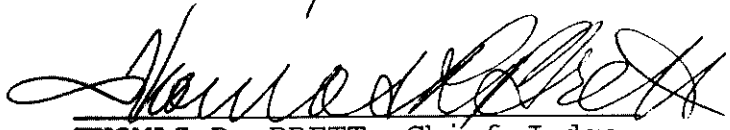
Even assuming the State should be responsible for more than

⁴In his supplemental brief (doc. #13), Petitioner alleges that he has been prejudiced by the ten-year delay in his direct criminal appeal. He states that the constitutional errors could have been corrected "had the Petitioner's appeal been adjudicate[d] in the twenty four (24) months [sic] time frame that has been spelled out in Harris." (Doc. #13 at 3.)

two years of the delay, and therefore, that prejudice should be presumed under Harris III, 1995 WL 73732, at *3, this Court believes Respondents have rebutted any presumption of prejudice. As noted above, this case presents "a break down in communication between the trial court and Petitioner's trial counsel" and circumstances which are totally distinct from the ones in the Harris litigation.

As Petitioner has not established prejudice with particularity, he has failed to establish any prejudice arising from the delay in adjudicating his direct appeal and the Court must conclude that the delay does not give rise to an independent due process claim. Accordingly, Petitioner's motion for an emergency injunction (doc. #15) and his petition for a writ of habeas corpus (doc. #1) are hereby **denied**.

SO ORDERED THIS 14 day of apr., 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MATTHEW WILLIAMS, JR., MATTHEW
WILLIAMS, SR.; COUNTY TREASURER,
Tulsa County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ENTERED
APR 17 1995

CIVIL ACTION ~~DATE~~ 94-C 379B

This matter comes on for consideration this 14 day of April, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County**, appear not, having previously claimed no right, title or interest; and the Defendants, **Matthew Williams Jr. and Matthew Williams Sr.**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Matthew Williams, Jr. is a single person.

The Court being fully advised and having examined the court file finds that the Defendant, **Matthew Williams, Sr.**, acknowledged receipt of **Summons** and Complaint via Certified Mail on September 15, 1994.

The Court further finds that the Defendant, **Matthew Williams, Jr.**, was served by publishing notice of this action in

NOTE: THIS DOCUMENT CONTAINS UNCLASSIFIED
EXCEPT WHERE SHOWN OTHERWISE. IT IS TO BE RELEASED AND
FORN DISSEMINTATIONS IMMEDIATELY
UPON REQUEST.

the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning January 30, 1995, and continuing through March 6, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, **Matthew Williams Jr.**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, **Matthew Williams Jr.**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by

publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on May 9, 1994; and that the Defendants, **Matthew Williams Jr. and Matthew Williams Sr.**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**Lot Thirteen (13), Block Thirteen (13),
SUBURBAN HILLS ADDITION to the City of Tulsa,
Tulsa County, State of Oklahoma, according to
the recorded plat thereof.**

The Court further finds that on March 31, 1982, the Defendant, **Matthew Williams, Jr.**, executed and delivered to **Realbanc, Inc.** his mortgage note in the amount of \$20,000.00, payable in monthly installments, with interest thereon at the rate of fifteen and one-half percent (15.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, **Matthew Williams, Jr.**, a single person, executed and delivered to **Realbanc, Inc.** a mortgage dated March 31, 1982, covering the above-described property. Said mortgage was recorded on April 5,

1982, in Book 4604, Page 1866, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 6, 1988, FirstTier Mortgage Co., (formerly known as Realbanc, Inc.), assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was recorded on September 19, 1988, in Book 5128, Page 2944, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 25, 1989, LEADER FEDERAL SAVINGS AND LOAN ASSOCIATION assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT, his successors in office assigns. This Assignment of Mortgage was recorded on April 25, 1989, in Book 5179, Page 1542, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 1, 1989, the Defendant, Matthew Williams, Jr., entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on April 1, 1990 and April 1, 1991.

The Court further finds that the Defendant, Matthew Williams, Jr., made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Matthew Williams, Jr., is indebted to the Plaintiff in the principal sum of \$26,454.67,

plus interest at the rate of 15.5 percent per annum from April 14, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, **County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property

The Court further finds that the Defendants, **Matthew Williams Jr. and Williams Matthew Sr.**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Matthew Williams Jr.**, in the principal sum of \$26,454.67, plus interest at the rate of 15.5 percent per annum from April 14, 1994 until judgment, plus interest thereafter at the current legal rate of 6.41% percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Matthew Williams, Jr., Matthew Williams, Sr., County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Matthew Williams, Jr., to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession

based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

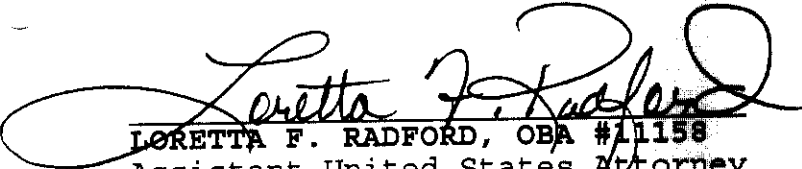
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 94-C 379B
LFR:lg

4-13

FILED

APR 17 1995

United States District Court

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Northern

DISTRICT OF

Oklahoma

James L. Bell,
SSN: 441-48-0011,
Plaintiff, v.

Donna E. Shalala,
Secretary of Health &
Human Services,
Defendant.

JUDGMENT IN A CIVIL CASE

ENTERED ON DOCKET

CASE NUMBER: 92-C-1087-E / DATE APR 17 1995

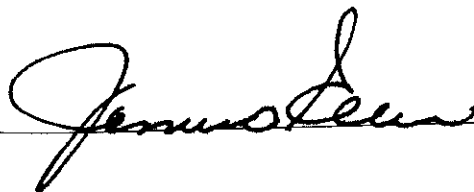
- ☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the case be reversed and remanded for benefits per Order signed by Judge James O. Ellison on February 14, 1995 and entered on the docket on February 16, 1995.

Date

4/14/95

Clerk



(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 17 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

SHELTER GENERAL INSURANCE)
COMPANY, a Missouri corporation,)

Plaintiff,)

v.)

No. 93-C-411-E

RANDY and PATTY MARTIN, husband)
and wife,)

Defendant.)

ENTERED ON DOCKET

DATE APR 17 1995

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 14 day of April, 1995, it appearing to
the Court that this matter has been compromised and settled, this
case is herewith dismissed with prejudice to the refiling of a
future action.

JAMES O. ELLISON

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUDY A WARREN,
Plaintiff,
vs.
SUSAN LOVING, et al.,
Defendants.

No. 94-C-997-E

FILED

APR 17 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE APR 17 1995

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on February 22, 1995. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ In any event the Court concludes that Plaintiff has failed to state a claim upon which relief can be granted. Plaintiff's due process rights were not violated when she was temporarily placed in a correctional center to meet a programmatic need and when she was placed on grievance restriction. Lastly, Plaintiff's request for injunctive relief is now moot in that on December 2, 1994, Plaintiff completed the Female Offender Regimented Treatment Program (FORT) and was returned to the Specialized Supervision


¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

Program (SSP).

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss (doc. #9) is **granted** and the above captioned case is dismissed with prejudice at this time.

SO ORDERED THIS 14TH day of April, 1995.


JAMES O ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DATE APR 11 1995

FILED

CARL R. BERG, and CARL R. BERG, II,
individually and as next of kin to
DOROTHY I BERG, deceased,

Plaintiffs,

vs.

SEARS, ROEBUCK AND CO. and
WHIRLPOOL CORPORATION,

Defendants.

Case No. 94-C-21-K

Richard M. Law, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER FOR DISMISSAL WITH PREJUDICE

Upon consideration of the Stipulation for Dismissal with Prejudice filed by all parties, and being fully advised in the premises, the Judge of this Court finds that said stipulation should be granted.

IT IS HEREBY ORDERED that the Stipulation for Dismissal with Prejudice is granted, and Plaintiffs' Complaint and any subsequent amended complaints are hereby dismissed with prejudice to the refiling of same. It is further ordered that the costs and attorneys fees shall be born by the parties respectively.

DATED this 11 day of April, 1995.

/ TERRY C. KERN

UNITED STATES DISTRICT COURT JUDGE

NEAL E. STAUFFER, OBA #13168
WILLIAM B. SELMAN, OBA #8072
KENT B. RAINEY, OBA #14619
JOSEPH R. ROBERTS, OBA #7639
SELMAN AND STAUFFER, INC.
601 South Boulder
700 Petroleum Club Building
Tulsa, Oklahoma 74119
(918)592-7000
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 17 1995

JAMES JONES,

Plaintiff,

v.

WAL-MART STORES, INC., d/b/a SAM'S
CLUB, a Delaware corporation,

Defendant.

Case No. 94C-867K

FILED

APR 17 1995

Richard M. Law, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Upon the Motion of Defendant and by agreement of the parties, the Court finds that an Order should be granted for the purpose of requesting the State of New Mexico, Department of Labor to relinquish documents in their possession to defense counsel, McKinney, Stringer & Webster, P. C. concerning James Jones, (SS# 85-56-7485, DOB 1-11-58) relating to appeal files 0248-92-UC and 018-92.

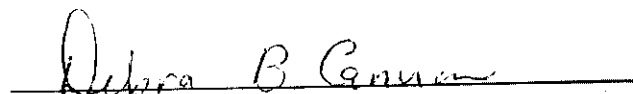
s/ TERRY C. KERN

JUDGE OF THE DISTRICT COURT

APPROVED:


LOUIS C. PAPPAS, ESQ.

Attorney at Law
610 South Main Street, Suite 206
Tulsa, OK 74119


MICHAEL W. BREWER

DEBRA B. CANNON
McKINNEY, STRINGER & WEBSTER, P.C.
101 North Broadway
Oklahoma City, Oklahoma 73102
405/239-6444

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 14 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FRANCIS HARRINGTON,

Plaintiff,

vs.

DONNA E. SHALALA, SECRETARY
OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 93-C-705-BU

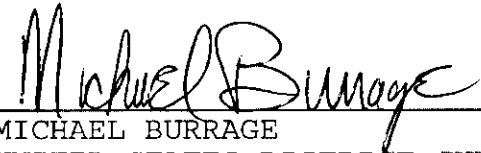
ENTERED ON DOCKET

DATE APR 17 1995

JUDGMENT

Pursuant to the Court's Order, judgment is hereby entered in favor of Plaintiff, Francis Harrington, against Defendant, Donna E. Shalala, Secretary of Health and Human Services, and this action is remanded to Defendant for further administrative proceedings.

ENTERED this 14 day of April, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE **F I L E D**

NORTHERN DISTRICT OF OKLAHOMA

APR 14 1995

FRANCES HARRINGTON,

Plaintiff,

vs.

DONNA E. SHALALA, SECRETARY
OF HEALTH AND HUMAN SERVICES,

Defendant.

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 93-C-705-BU

ENTERED ON DOCKET

DATE APR 17 1995

ORDER

This matter comes before the Court upon the appeal of Plaintiff, Frances Harrington, to the Secretary's denial of disability benefits.

Plaintiff filed an application for disability benefits on August 8, 1990. An Administrative Law Judge ("ALJ") held a hearing in regard to the application and subsequently denied benefits. The Appeals Council remanded the case back to the ALJ on February 20, 1992. After a second hearing, the ALJ recommended that Plaintiff be found not disabled. The Appeals Council accepted the ALJ's recommendation and determined that Plaintiff was not disabled on February 9, 1993. This decision became the final decision of Defendant, Donna E. Shalala, Secretary of Health and Human Services ("Secretary"). Plaintiff thereafter filed her complaint on August 6, 1993 for judicial review of the Secretary's final decision pursuant to 42 U.S.C. § 405(g).

In her brief, Plaintiff alleges two errors with regard to the Secretary's decision. First, Plaintiff alleges that the Secretary failed to properly evaluate her ability to perform sedentary or

14

light work due to her need to alternate between sitting and standing. This allegation, however, was abandoned by Plaintiff's attorney at oral argument. Second, Plaintiff claims that the Secretary failed to properly document and evaluate her transferable skills.

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion. Andrade v. Secretary of Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988). The inquiry is not whether there was evidence which would have supported a different result, but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dept. of Health & Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams, 844 F.2d at 750.

The Secretary uses a five-step inquiry in determining whether a claimant is disabled. 20 C.F.R. § 416.920 (1988). The five steps are:

1. Is the claimant currently working?
2. If the claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security regulations. If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does the claimant's impairment prevent him from doing any other work?

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Once step five is reached, the burden shifts to the Secretary to show that the claimant retains the capacity to perform alternative work types that exist within the national economy. Diaz v. Secretary of Health & Human Services, 898 F.2d 774, 776 (10th Cir. 1990).

In the instant case, the ALJ found that Plaintiff could not return to her past relevant work. Therefore, the burden shifted to the Secretary to show that Plaintiff could perform other work in the national economy after considering her residual functional capacity ("RFC"), age, education, and past work experience. 20 C.F.R. § 416.920(f). Relying on testimony by a vocational expert, the ALJ found that Plaintiff could perform a significant number of other jobs, namely, office supervisor, order clerk, or information clerk.

Plaintiff contends that the jobs named by the ALJ are classified as either semi-skilled or skilled occupations.

Plaintiff contends that the vocational expert confirmed this by naming these jobs which would utilize Plaintiff's work skills. According to Plaintiff, The Dictionary of Occupational Titles ("DOT") also indicates that these jobs are semi-skilled or skilled in nature. Plaintiff contends that before a person can perform a semi-skilled or skilled job, he or she must have the skills required by that job. Plaintiff asserts that when transferability of skills is an issue, then the ALJ must make specific findings of fact about the skills which are transferable and the jobs to which they can be transferred. Plaintiff contends that the ALJ failed to do so in this case.

The Secretary argues that substantial evidence exists to support her decision. The Secretary specifically relies upon the vocational expert's testimony which indicated that there were a significant number of other jobs which Plaintiff could perform. The Secretary contends that the vocational expert's testimony established that Plaintiff possessed vocational skills transferable to the jobs mentioned by the ALJ. In addition, the Secretary contends that the issue of transferability of skills is not relevant at least to the jobs of information clerk and cashier as the vocational expert testified that such jobs were unskilled. The Secretary further contends that the Medical-Vocational Guidelines ("grids") indicate that Plaintiff could be found not disabled even if she had no transferable skills to the listed jobs since she is able to perform light work.

Initially, the Court rejects the Secretary's reliance on the

grids. The grids can be used only when a claimant is able to perform substantially all of the work existing at the level of exertion in question. Thompson, 987 F.2d at 1488; Talbot v. Heckler, 814 F.2d 1456, 1463 (10th Cir. 1987); Soc. Sec. Rul. 83-11. The ALJ found that Plaintiff must alternate positions every two hours throughout the day. While this limitation might not preclude all jobs, it certainly prevents Plaintiff from performing a substantial number of jobs existing at the light exertional level. A person who must alternate periods of sitting and standing is not "functionally capable of doing. . .the prolonged standing or walking contemplated for most light work." Soc. Sec. Rul. 83-12; Talbot, 814 F.2d at 1463. The Court therefore concludes that Plaintiff's RFC prevents the conclusive application of the grids.

Moreover, the Court finds that the ALJ made transferability of skills an issue in this case when he found that Plaintiff was unable to perform her past work but was able to perform other semi-skilled and skilled jobs. The Secretary does not require people to do more complex jobs than they have actually performed. Soc. Sec. Rul. 82-41. In order to perform the jobs mentioned by the ALJ, Plaintiff must have the skills needed to perform those jobs. In his findings, the ALJ suggests that Plaintiff has transferable skills. When the transferability of skills is an issue, Soc. Sec. Rul. 82-41 requires the ALJ to make supporting findings of fact in determining whether a claimant's job skills are transferable, including identifying the acquired job skills and the positions to which those skills are transferable. Nielson v. Sullivan, 992 F.2d

1118, 1120 (10th Cir. 1993); Soc. Sec. Rul. 83-11. The Court finds that such a requirement is particularly pertinent in this case.

At the first hearing, the vocational expert testified that Plaintiff's past work, nurse's aide and business owner, would be considered semi-skilled. The vocational expert at the second hearing said that a nurse's aide job is semi-skilled but that Plaintiff's work as a business owner was considered a skilled position. If Plaintiff's past work was limited to semi-skilled work, then she would not be able to perform the skilled position of an office supervisor. In addition, it is unclear what skills the claimant would be able to use from being a nurse's aide. The Secretary has acknowledged that the only skills normally acquired from being a nurse's aide are those relating to taking and recording temperature, pulse and respiration, and recording food and liquid intake and output. Those skills are considered "occasional or incidental parts of the overall nurse aide job, which are a small part of a higher skilled job (nurse) [and] would not ordinarily give a meaningful vocational advantage over unskilled work." Soc. Sec. Rul. 82-41. Considering the Secretary's ruling and the conflicting testimony by the vocational experts, the Court finds that it is not clear that Plaintiff has any skills which could be used to perform any of the jobs mentioned by the ALJ.


The Court also concludes that the Secretary's position regarding the information clerk and cashier must also be rejected. It appears that the vocational expert did testify at the hearing

that the information clerk and cashier jobs were unskilled. However, the DOT lists the information clerk as semi-skilled. It also it lists several different cashier jobs ranging from unskilled to those requiring up to two years to learn. The Court concludes that similar to past relevant work, a finding that a claimant can perform a job based upon a "generic occupational classification is likely to be fallacious and unsupportable." Soc. Sec. Rul. 82-61.

The ALJ has a duty to fully develop the record. This duty is heightened when a claimant is unrepresented. Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992). When transferability of skills is an issue, the ALJ is required to make specific findings of fact regarding the skills which are transferable. The ALJ failed to make such findings.

As previously stated, the Secretary has the burden of showing that Plaintiff can perform the jobs mentioned by the ALJ. The Court concludes that merely stating that Plaintiff can perform the mentioned jobs does not constitute substantial evidence. This is true in light of the inconsistent vocational testimony, the Social Security Rulings and the DOT. Accordingly, the Court finds that the ALJ's decision is not supported by substantial evidence. The Court finds that this case should be and is hereby REMANDED for further development of the vocational issue. If transferability of skills is indeed an issue, the ALJ is instructed to make specific findings regarding the skills which are transferable and the jobs to which they are transferable.

ENTERED this 14 day of April, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 17 1995

JOHNNY DANIELS,

Plaintiff,

vs.

Case No. CIV 94-C-299-K

CITY OF TULSA, OKLAHOMA,
a municipal corporation,
et al.,

Defendants.

JOURNAL ENTRY OF JUDGMENT

NOW, on this 13 day of April, 1995, this matter comes before this Court pursuant to request by the parties. This Court having examined the pleadings filed herein, having heard statements of counsel and being fully appraised in the premises finds as follows:

1. This Court has jurisdiction of parties in the subject matter of this action.
2. Parties have entered into an agreed settlement of all Plaintiff's claims against the Defendants herein.
3. Pursuant to said agreement, the Plaintiff shall have judgment against the City of Tulsa for Seventy Thousand Dollars (\$70,000.00).
4. The Plaintiff and Defendants have entered into a Joint Stipulation For Dismissal With Prejudice of all of his claims against the individual defendants Ronald Palmer, James Leach, Michael L. Zenoni, Jeff Felton, Shawn Casey and Ray Manning.
5. Said judgment against the City of Tulsa represents all of Plaintiff's claims as of the date of this judgment. Said claims include, but are not limited to, any claim against the defendants based on federal law and state law whether claims are known or not known.

6. Said judgment does not include any amount as wages to the Plaintiff but includes personal injury, accidental injury, interests, costs and attorney fees.

7. The Mayor of the City of Tulsa has approved this settlement as Executive Officer for the City of Tulsa.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Johnny Daniels, has judgment against the Defendant City of Tulsa, in the amount of Seventy Thousand Dollars (\$70,000.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the suit of the Plaintiff against the individual Defendants Ronald Palmer, James Leach, Michael L. Zenoni, Jeff Felton and Shawn Casey and the City of Tulsa is hereby dismissed with prejudice.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

Approved:



CHARLES R. FISHER,
Attorney for Defendants

DAVID GARRETT LAW OFFICE, P.C.



David M. Garrett, OBA #3255
Mitchell A. Lee, OBA #5357
Tami D. Mickelson, OBA #13400
Timothy R. Haney, OBA #16234
10th Floor/Severs Bldg.
215 State Street
Muskogee, Oklahoma 74401
Attorneys for Plaintiff


Johnny Daniels, Plaintiff

ENTERED ON DOCKET

DATE APR 17 1995

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM L. CHURCH, JUSTICE
KNIGHTS KU KLUX KLAN,

Plaintiff,

vs.

STATE OF OKLAHOMA, et al.,

Defendants.

No. 95-C-122-K

FILED
APR 17 1995
Richard M. Law, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

On March 17, 1995, Plaintiff filed an "objection" to this Court's March 13, 1995 order denying his motion for reconsideration under Fed. R. Civ. P. 59(e). Plaintiff states that he is entitled to appellate review and that this Court should permit him to refile this action under Fed. R. Civ. P. 60(b).

After reviewing Plaintiff's "objection" and liberally construing it in Plaintiff's favor in accordance with his pro se status, the Court concludes that the same should be denied. To the extent that Plaintiff seeks to appeal the March 13, 1995 order denying his motion for reconsideration, he needs to formally file a notice of appeal in this Court. The Clerk of the Court will then forward the notice and the record in this case to the Tenth Circuit Court of Appeals.

ACCORDINGLY, IT IS HEREBY ORDERED, that Plaintiff's "objection" (doc. #6) is denied.

IT IS SO ORDERED this 13 day of April, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE APR 17 1995

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICHARD EUGENE MICKEY,

Plaintiff,

vs.

TULSA COMMUNITY CORRECTION CENTER,
and THE OKLAHOMA ATTORNEY GENERAL,

Defendants.

No. 95-C-161-K

F I L E D

APR 17 1995

Richard E. Mickey
Plaintiff

Clark
Court

ORDER

On March 2, 1995, the Court granted Plaintiff's motion for leave to proceed in forma pauperis and sua sponte dismissed this action as frivolous, concluding that Plaintiff's claim under the FOIA, 5 U.S.C. § 552, was based on an undisputably meritless legal theory because neither of the state agencies named as defendants are subject to the provisions of that statute. On March 10, 1995, Defendants moved to dismiss this action for failure to state claim relying on the same grounds cited in this Court's order.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to dismiss (doc. #5) is **granted**.

IT IS SO ORDERED this 13 day of April, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE APR 17 1995

SOLAN CARL SCOTT,
Plaintiff,
vs.
STANLEY GLANZ,
Defendant.

No. 94-C-927-K

FILED

Richard M. L... Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff, a state prisoner appearing pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983, alleging that his constitutional rights were violated when his mail was improperly handled, "altered," and part of his correspondence was not delivered. Plaintiff also alleges that Defendant Stanley Glanz has failed to distribute incoming mail in a timely manner. Defendant Glanz has moved to dismiss this case as frivolous on the basis of the court-ordered Martinez report. See Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978); Worley v. Sharp, 724 F.2d 862 (10th Cir. 1983). Plaintiff has failed to respond.

Plaintiff's failure to respond to Defendant's motion to dismiss constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ In any event the Court concludes that this case is

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

frivolous and should therefore be dismissed under 28 U.S.C. § 1915(d).

Section 1915(d) is intended to discourage filing of baseless suits which would not generally be initiated by paying litigants. Neitzke v. Williams, 490 U.S. 319, 327 (1989). "The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke, 490 U.S. at 325). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A fanciful factual allegation would be one which is clearly baseless, fantastic, or delusional. Id. In determining whether a suit is frivolous, this court must weigh the allegations in favor of the plaintiff. Denton v. Hernandez, 112 S.Ct. 1728, 1733 (1992).

Plaintiff's general conclusions are too vague and conclusory to be sufficient to state a claim arguably based in law or fact. See Frazier v. Dubois, 922 F.2d 560, 562 n.1 (10th Cir. 1990). The Tulsa County Jail follows specific procedures in handling prisoner's incoming and outgoing mail. (Ex. E attached to the Special Report.) Moreover, the "Mail Log," attached as exhibit "G" to the Special Report, refutes the allegation that Plaintiff did not receive correspondence during the period in question.

ACCORDINGLY, IT IS ORDERED that Defendant Stanley Glanz's motion to dismiss this case as frivolous (doc. #6) is granted and this case is hereby dismissed.

SO ORDERED THIS 13 day of April, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR -10 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ERNESTO HERNANDEZ-ROSALES,

Plaintiff,

vs.

No. 94-C-560-B

IMMIGRATION AND NATURALIZATION)
SERVICES, et al.,

Defendants.

EOD 4/14/95

ORDER

On March 13, 1995, the Court sua sponte granted Plaintiff a fifteen-day extension of time to respond to Defendants' motion to dismiss, or in the alternative, for summary judgment. The Court further advised Plaintiff that his failure to respond to Defendants' motion would constitute a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ Plaintiff has not responded.

ACCORDINGLY IT IS ORDERED that:


- (1) Defendants' motion to dismiss (doc. #6) is **granted** and that this case is **hereby dismissed without prejudice**;
- (2) The Court will **reinstate** this action if Plaintiff submits a response to Defendants' motion to dismiss, or in the alternative for **summary** judgment, no later than ten (10) days from the date of entry of this order. See Miller v.

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

Department of the Treasury, 934 F.2d 1161 (10th Cir. 1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 10th day of apr, 1995.


THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

FILED

APR 13 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM A. EPPERSON,

Plaintiff,

vs.

PROTEIN TECHNOLOGIES INTERNATIONAL, INC.,
a Delaware corporation, doing business in
the State of Oklahoma, and a subsidiary of
Ralston-Purina Company, and TIC GUMS, INC.,
a Maryland Corporation doing business in
the State of Oklahoma,

Defendants.

Case No. 94-C-842-B

ENTERED

DATE APR 14 1995

ORDER

The Court has for decision a Motion for Summary Judgment filed by Defendant Tic Gums, Inc. ("Tic") pursuant to Fed. R. Civ. P. 56, requesting the dismissal of Tic as a Defendant. (Docket # 5). The initial Motion by Tic addressed only the issue of products liability-failure to warn. In its supplemental brief, Tic stated that its Motion should have also addressed the issue of negligence.¹ (Docket # 9). Defendant Protein Technologies International, Inc. ("Protein") has not joined in the Motion for Summary Judgment.

This case's genesis occurred on or about September 14, 1992, when Plaintiff William A. Epperson ("Epperson") slipped and fell in a mixture of "guar" and water in Protein's facility located at Mid-America Industrial Park on Hunt Street in Pryor, Oklahoma. Epperson

¹ Tic requested and received permission to file a supplemental brief on the issue of negligence, stating: "[i]t has been brought to this Defendant's attention that the Plaintiff not only sued it on the theory of products liability but also on the theory of negligence." Tic's Supplemental Brief, Docket #9.

was an employee of Alpha Sales working as an insulator. Alpha Sales had a contract with Protein to provide certain services for Protein. Epperson, as an employee of Alpha Sales, had worked at Protein's facility since 1987 as an insulator. As a result of the fall, Epperson was injured, for which he has received Workers' Compensation benefits.

Guar is a substance manufactured by Tic and used by Protein in its production operations. Tic was Protein's commercial source for guar. Guar is a powder which, when mixed with water, allegedly becomes very slippery. During production operations at Protein, guar is occasionally spilled on the floor and, when combined with water, allegedly forms a potential hazard.

Epperson, apparently, never came in contact with, directly used, or heard of guar prior to his fall. Although Epperson worked at the Protein facility for five years, he did so as an insulator. Thus, it is reasonable to conclude that he may not have used guar, a single element of a process in which he was not involved.

Epperson filed suit against Defendants in State court based upon products liability-failure to warn, alleging that guar was unreasonably dangerous. (Attachment, Docket #1). The matter was subsequently removed to federal court. (Docket #1).

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Widon Third Oil &

Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the Court stated:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

* * *

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must

present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).


Concerning the claim of Oklahoma manufacturers products liability-failure to warn, Tic alleges that because Epperson is neither a consumer nor user of the product, guar, Epperson cannot maintain a cause of action against Tic. (Docket # 5). The Tenth Circuit has recognized that under Oklahoma law, to maintain an action against a manufacturer for failure to warn concerning an unreasonably dangerous product, the claimant must be an ordinary user or consumer of the product. Rohrbaugh v. Owens-Corning Fiberglass Corp., 965 F.2d 844, 846 (10th Cir. 1992) (citing Woods v. Fruehauf Trailer Corp., 765 P.2d 770, 774 (Okla. 1988)). Additionally, the claimant must be a foreseeable purchaser or user of the product. Rohrbaugh, 965 F.2d at 846. Thus, if the claimant is not a foreseeable and ordinary user or consumer of the product, Defendant does not have a duty to warn that claimant.

The Court concludes Plaintiff was not an intended user or consumer of the product "guar"; therefore, Defendant Tic owed no duty to warn to Plaintiff under the theory of manufacturers products liability. The Court further concludes Tic's Motion for Summary Judgment, viewed in a light most favorable to the nonmovant, should be granted.

There is some question in the Court's mind concerning a negligence claim against Tic, notwithstanding Tic's current defense against such claim. In his Petition, Epperson asserted, regarding the manufacturers products liability claim, that Tic "was negligent in failing to instruct and warn of the dangerous propensities of guar." (Attachment, Docket # 1). Yet in Tic's Supplementary Brief (Docket # 9) Tic "acknowledges" that the claim against Tic includes negligence, apparently stemming from some clarifying communication between Tic and Epperson which is not reflected in the record. If negligence is to be an issue herein between Tic and Epperson, the proper course of action would be for Plaintiff Epperson to file an amended complaint alleging negligence against Tic within 15 days from this date and Defendant Tic is granted 10 days thereafter to file a responsive pleading. Failing to amend its Complaint within the 15 days allowed, the Court will conclude the matter will proceed against Defendant Protein only.

In summary the Court concludes Defendant Tic owes no duty to warn Epperson as a foreseeable user or consumer of the product "guar" under a theory of manufacturers products liability. Rohrbaugh, 965 F.2d at 846. Therefore, the Court GRANTS the Motion for Summary Judgment in favor of Defendant Tic on the issue of manufacturers products liability/failure to warn.

IT IS SO ORDERED, this 13th day of April, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

APR 12 1955

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

DAVID S. LYND,
444-64-9807

Defendant,

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

CIVIL NUMBER 94-C-933-B

ENTERED

DATE APR 14 1955

JUDGMENT BY DEFAULT

Upon application of the Plaintiff, the Court, having examined the records and files in this cause, and being fully advised in the premises, finds that service of process in manner and form provided by law was had upon the defendant, more than twenty days prior to this date.

And it further appearing to the court that the defendant has failed to appear, plead or answer, but has wholly made default, whereupon said defendant is adjudged in default.

And it further appearing to the court that the said plaintiff has filed an Affidavit pursuant to the Soldiers' and Sailors' Civil Relief act of 1940, as amended, and the court finds that the possibility of impairing any right thereunder of the defendant, is remote and that an order should be issued herein directing entry of judgment.

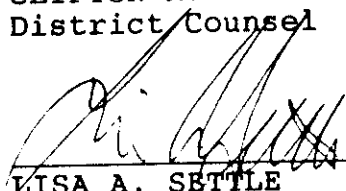
IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, United States of America, have and recover from the defendant, the sum of \$611.50 with interest at the rate of 6 1/4 % until paid, plus a surcharge of ten (10) percent of the amount of Plaintiff's claim in accordance with the provisions of 28 U.S.C. 3011, and the costs of this action accrued and accruing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that this judgment be entered.

S/ THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

CLIFTON R. BYRD
District Counsel



LISA A. SETTLE
Staff Attorney
Department of Veterans Affairs
Office of District Counsel
125 South Main Street
Muskogee, OK 74401
(918) 687-2191

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 14 1995

DEBRA MCCULLOCH,

Plaintiff,

v.

AMERADA HESS CORPORATION,

Defendant.

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-903BU

ENTERED ON DOCKET

DATE APR 14 1995

ORDER OF DISMISSAL WITH PREJUDICE

This matter came on before the Court this 13 day of April, 1995, upon the parties' Joint Stipulation of Dismissal With Prejudice, and for good cause shown, it is therefore ORDERED, ADJUDGED AND DECREED, that Plaintiff's cause of action against Defendant is hereby dismissed with prejudice, with each party to bear its own costs and attorneys' fees.

SCOTT MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**
NORTHERN DISTRICT OF OKLAHOMA

APR 13 1995 *RL*

GILFORD D. DeLOZIER and
EMILY G. DeLOZIER,

Plaintiffs,

vs.

GULF INSURANCE COMPANY,

Defendant.

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 95-C-71-BU ✓

ENTERED ON DOCKET

DATE APR 14 1995

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 13th day of April, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

SEPARATION AND RECOVERY
SYSTEMS, INC., a Nevada
corporation,

Plaintiff,

v.

CLEAN AMERICA CORPORATION,
a Delaware corporation,

Defendant.

F I L E D

APR 12 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-317-BU

ENTERED ON DOCKET

DATE APR 12 1995

JUDGMENT

JUDGMENT IS HEREBY ENTERED in favor of Plaintiff Separation and Recovery Systems, Inc. ("Plaintiff") and against Defendant Clean America Corporation ("Defendant") on Plaintiff's claims against Defendant in the amount of \$350,000.00, inclusive of interest, costs, and attorneys fees as of the date of this Judgment, plus post-judgment interest thereon at the rate of 18% per annum.

JUDGMENT IS FURTHER ENTERED in favor of Plaintiff and against Defendant on Defendant's counterclaims against Plaintiff.

JUDGMENT IS SO ENTERED THIS 13 DAY OF APRIL, 1995.

s/ MICHAEL BURRAGE

**THE HONORABLE MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE**

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 13 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiffs,

vs.

Case No. 94-C-1006-BU

PROCEEDS FROM THE SALE OF
REAL PROPERTY KNOWN AS: 3509
SOUTH FLORENCE, TULSA, OKLAHOMA,
IN THE AMOUNT OF FIVE THOUSAND
FIVE HUNDRED SEVENTY-NINE AND
39/100 DOLLARS (\$5,579.39),
Defendant.


ENTERED ON 11 13
APR 14 1995

ADMINISTRATIVE CLOSING ORDER

Upon agreement of counsel for Plaintiff, United States of America, the Court hereby **orders** the Clerk to administratively terminate this action in his records without prejudice pending criminal investigation and subsequent criminal proceedings against the owner of the seized property at issue in this action.

Once the criminal investigation and subsequent criminal proceedings have concluded, the government may reopen this matter for final resolution.

Entered this 13th day of April, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

APR 13 1995

JOSE NEVAREZ,

Plaintiff,

vs.

TRANSOK GAS CO.,

Defendants.

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-1113-BU

ENTERED ON DOCKET

DATE APR 14 1995

O R D E R

This matter came before the Court for case management conference on April 13, 1995. Counsel for the Plaintiff did not appear. The record additionally reflects that service of summons and complaint has not been accomplished upon Defendant within 120 days after the filing of complaint. Accordingly, pursuant to Rule 4(m) and Rule 16(f), Fed. R. Civ. P., the Court hereby DISMISSES WITHOUT PREJUDICE the above-entitled action.

ENTERED this 13th day of April, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 14 1995
FILED
APR 14 1995

BRIAN D. BASS, Individually, and
on behalf of other Plaintiffs
named below,

Plaintiffs,

vs.

CITY OF SAND SPRINGS,
OKLAHOMA, a Municipal
corporation,

Defendant.

Case No. 93-C-634-E

Richard L. Bingham, Clerk
U.S. District Court
Northern District of Oklahoma

STIPULATION OF DISMISSAL WITH PREJUDICE

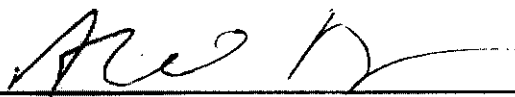
Pursuant to Rule 41, the parties stipulate that the captioned matter is dismissed with
prejudice.

Dated this 13 day of ^{April}~~February~~, 1995.

Respectfully submitted,

Mark W. Schilling

Donald M. Bingham
Mark W. Schilling
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West 6th Street
Tulsa, OK 74119
ATTORNEYS FOR PLAINTIFFS



Andrew W. Lester, OBA No. 5388

Shannon F. Davies, OBA No. 13565

LESTER & BRYANT, P.C.

119 N. Robinson, Suite 820

Oklahoma City, Oklahoma 73102

(405) 232-8436

ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 14 1995

FREEDOM RANCH, INC., d/b/a
FREEDOM HOUSE, an Oklahoma
nonprofit corporation,

Plaintiff,

vs.

THE CITY OF TULSA, OKLAHOMA,
a municipal corporation,

Defendant.

No. 93-C-96-E

FILED

APR 14 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

The Court has before it for consideration the Joint Application For Settlement Order filed herein by the parties wherein it is requested that this Court approve a settlement of this controversy by the issuance of mandatory and prohibitory injunctions to be enforced by this Court.

The City of Tulsa (City) and Freedom Ranch, Inc. (FRI) acknowledge in their Application that they have been involved in a dispute over zoning for the convict pre-release center operations of FRI since 1990 and it is in the best interest of both parties that the dispute be ended and the litigation be dismissed.

The parties were the subject of a Settlement Conference in connection with Case No. 94-5194 in the UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FREEDOM RANCH, INC. dba FREEDOM

24

HOUSE an Oklahoma non-profit corporation, Appellant, vs THE CITY OF TULSA, OKLAHOMA, a municipal corporation, et al, Appellees, on appeal from THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA, Case No. 93-C-96-K, and at said Settlement Conference, the parties agreed to settle their differences in as complete a manner as possible, and therefore have presented for the Court's approval a settlement proposal requiring entry of an order of the Court, which the Court finds proper and acceptable. The parties application is herewith approved.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT:

1. FRI shall, on or before September 5, 1995, dismiss, with prejudice, this litigation described above as Case No. 93-C-96-K in THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.
2. FRI shall, on or before September 5, 1995, dismiss, with prejudice, the litigation described above as Case No. 94-5194 in the UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.
3. FRI shall dismiss the application for Special Exception on the 245 West 12th Street property which is currently pending before the City's Board of Adjustment.
4. FRI shall, within five days from the date of this order, dismiss, with prejudice, that litigation referred to by the parties as the "Kenosha litigation", Case No. 94-C-223E IN


THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA, FREEDOM RANCH,
INC. d/b/a FREEDOM HOUSE, an Oklahoma
non-profit corporation, Plaintiff, vs THE
CITY OF TULSA, OKLAHOMA, a municipal
corporation, Defendant.

5. From and after September 1, 1995, FRI and its
President, Dave King, any of its principals,
subsidiaries, affiliates or related
companies, or Dave King or any of his family
members or heirs, with respect to the
property located at 245 West 12th Street, are
hereby enjoined from using said property as
follows:
 - a. they shall not use or permit the use of the same
as a Convict Pre-Release Center as defined by the
Court of Appeals of the State of Oklahoma, Case
No. 79,170.
 - b. they shall not use or permit the use of the same
as a residence, temporary or permanent, for any
persons who are incarcerated by any organization
or agency including, but without limitation, the
Federal Bureau of Prisons or any Department of
Corrections, or for any persons that have been
referred under the TADD program of the Department
of Mental Health.
 - c. they shall not use or permit the use of the same

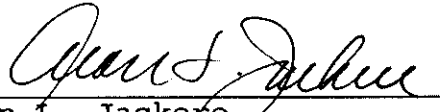
for any form of residential services for any type of program for persons awaiting sentencing, or for any type of program persons under the direction, authority, or order of any probation office. This specifically does not include people who may be referred to FRI prior to charges being brought against them on a "deferred prosecution" type of program, provided, however, that this limitation shall not be construed as an authorization or a permit to allow such use of the property without compliance with the ordinances of the City of Tulsa.

6. FRI shall remove all of its clients who fall within the categories of persons described in paragraph 5 immediately preceding, from the property at 245 West 12th Street, on or before September 1, 1995, and City shall permit FRI until said date to effect such removal.
7. City is enjoined and prohibited from filing any criminal charges or civil action against FRI, its officers, employees, or agents, for violation of the zoning code in relation to its occupancy of 245 West 12th Street up to and including the date specified in paragraph 6, immediately preceding, and relating to the time that FRI occupied the same without a Stay or without appropriate zoning.

ORDERED this 12 day of April, 1995.

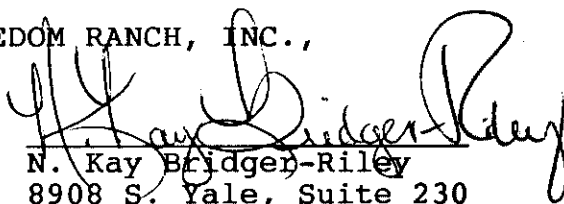

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

Approved as to form and
content:


Alan L. Jackere
Assistant City Attorney
Attorney for the City of Tulsa

FREEDOM RANCH, INC.,

By


N. Kay Bridger-Riley
8908 S. Yale, Suite 230
Tulsa, Oklahoma 74137


David S. King

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 14 1995

MITCHELL PRICE, III,

Plaintiff,

vs.

DONNA E. SHALALA, Secretary
of Health & Human Services,

Defendant.

No. 94-C-209-K

FILED

APR 14 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff, Mitchell Price, III, seeks judicial review of the Secretary's decision under the authority of 42 U.S.C. §405(g) and §1383(c)(3).

Simultaneous applications for Title XVI, Supplemental Security Income, and Title II, Social Security disability, benefits were filed by Mr. Price on October 20, 1992. Claimant's applications were denied initially and upon reconsideration. A timely request for hearing before an Administrative Law Judge ("ALJ") was filed, and the hearing was held on August 17, 1993. When the Appeals Council denied appeal, the decision of the ALJ issued on October 13, 1993 became the final decision of the Secretary.

Plaintiff contends the Administrative Law Judge erred in denying disability benefits by (1) finding plaintiff's mental impairment did not meet or equal the requirements of a listed impairment, (2) finding plaintiff's mental condition did not meet the 12 month duration requirements, and (3) finding plaintiff

retained the residual functional capacity ("RFC") to perform sedentary work despite his mental condition.

Mr. Price was born November 26, 1953, acquired a GED and completed an electronics vocational course. He served 3 years in the military and received training as a cook. Claimant's work history included office manager, auto salesman, sales manager, truck stop manager, truck driver, racetrack maintenance man, VCR repairman, and satellite installer. (Tr. 53-58, 86-90). Mr. Price claims he is unable to work because of vision perception deficiency, high frequency hearing loss, atypical chest pain, history of peptic ulcer disease, partially controlled hypertension, substance addiction disorder, personality disorder, affective disorder, status post bilateral carpal tunnel releases, and surgical repair of right shoulder. (Tr. 58-59, 66-68, 71-73, 74-77).

DISCUSSION

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).

4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).
5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

In this case at Steps 1 and 2, the ALJ found that claimant met the disability insured status requirements on October 14, 1990, the date Mr. Price stated he became unable to work, and continued to meet them through the date of the decision. The ALJ determined that Mr. Price had not engaged in substantial activity since October 14, 1990. At Step 3, the ALJ concluded the medical evidence established that claimant has slight exotropia of the right eye with 20/30 vision of both eyes, corrected; mild bilateral high frequency hearing loss; a history of smoking; atypical chest pain; a history of peptic ulcer disease on treatment with no acute ulceration; hypertension, partly controlled; a substance addiction disorder; a personality disorder; status post bilateral carpal tunnel releases; and surgical repair of fracture of the anterior

lateral aspect of the acromion and impingement syndrome of the right shoulder, but that claimant does not have an impairment or combination of impairments listed in, or medically equal to, one listed in Appendix 1, Subpart P, Regulations No. 4 (Tr. 30-31).

Claimant's alleged disability due to pain, dizziness, nervousness, blurred vision, hearing loss and other symptoms were found to be not credible or supported by the medical documents in evidence. The ALJ determined that claimant has the residual functional capacity ("RFC") to perform the physical exertional and nonexertional requirements of work, except for the inability to lift more than 20 pounds at a time and lift/carry more than 10 pounds frequently, to stand/walk more than 6 hours in an 8-hour day, to do more than occasional stooping, to be able to understand, remember, and carry [out] simple one-step tasks and some, but not all, more detailed tasks under routine supervision only, to do any overhead work or any work involving exposure to hazards such as unprotected heights or dangerous machinery, and to do any work requiring good binocular vision (Tr. 31). Although the ALJ found that Mr. Price was unable to perform his previous work, based on claimant's age, education, and RFC, the ALJ determined there were a significant number of jobs in the national economy which claimant could perform. Using the Medical-Vocational Guidelines as a framework and based upon the testimony of the vocational expert, the ALJ directed a conclusion that claimant was not under a "disability" and therefore, "not disabled" (Tr. 31-32).

The Secretary's decision and findings will be upheld if

supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

Since plaintiff's first two allegations are interrelated, the Court will consider them as one objection. Plaintiff contends the ALJ erred by finding that claimant's mental impairment did not meet or equal one listed, specifically §12.04, Affective Disorder, in "the Listings," nor did claimant's mental impairment meet the 12-month duration requirement. The evaluation of disability on the basis of mental disorders requires the documentation of a medically determinable impairment(s) as well as consideration of the degree of limitation such impairment(s) may impose on the individual's ability to work and whether these limitations have lasted or are

expected to last for a continuous period of at least 12 months. 20
C.F.R. Part 404, Subpt. P, Appendix 1 §12.00A.

Section 12.04, Affective Disorders, is characterized by a disturbance of mood, accompanied by a full or partial manic or depressive syndrome. Mood refers to a prolonged emotion that colors the whole psychic life; it generally involves either depression or elation.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Medically documented persistence, either continuous or intermittent, of one of the following:

1. Depressive syndrome characterized by at least four of the following:

- a. Anhedonia or pervasive loss of interest in almost all activities; or
- b. Appetite disturbance with change in weight; or
- c. Sleep disturbance; or
- d. Psychomotor agitation or retardation; or
- e. Decreased energy; or
- f. Feelings of guilt or worthlessness; or
- g. Difficulty concentrating or thinking; or
- h. Thoughts of suicide; or
- i. Hallucinations, delusions, or paranoid thinking; or

2. Manic syndrome characterized by at least three of the following:

- a. Hyperactivity; or
- b. Pressure of speech; or
- c. Flight of ideas; or
- d. Inflated self-esteem; or
- e. Decreased need for sleep; or
- f. Easy distractibility; or
- g. Involvement in activities that have a high probability of painful consequences which are not recognized; or
- h. Hallucinations, delusions or paranoid thinking; or

3. Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes);

AND

- B. Resulting in at least two of the following:
1. Marked restriction of activities of daily living; or
 2. Marked difficulties in maintaining social functioning; or
 3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or
 4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).

See 20 C.F.R., Part 404, Subpt. P, Appendix 1, §12.04.

There is substantial evidence to support the ALJ's finding that Mr. Price did not establish the level of severity required to be considered disabled under Step 3. Mr. Price did not prove the required characterizations under the A criteria, nor did he prove by clinical findings at least two marked deficiencies under the B criteria. (Tr. 30-31).

Dr. Goodman, a consultative psychiatrist, diagnosed Mr. Price with a personality disorder, NOS (not otherwise specified) (Tr. 326-330). Dr. Goodman also noted (1) that claimant had only sought psychiatric treatment once, in approximately 1982 following claimant's divorce; (2) that claimant suffered moderate to severe drug abuse, in remission, with prescription drug dependency, specifically Valium plus Halcion in large quantities; (3) that there was a large element of embellishment of claimant's symptoms and even possibly conscious malingering. Dr. Goodman found claimant to be neat, clean, oriented to time, place and person. Claimant's mood was one of slight apprehension without any

significant depression or elation; his affect was normal. Claimant's speech was logical and appropriate; his intelligence was in the normal range. According to Dr. Goodman, "[Claimant's] return to work at the present time will largely depend upon his motivation to be independent, plus his overcoming any secondary gain to returning to work" (Tr. 16, 326-329). "Secondary gain" here refers to a workers' compensation claim made by plaintiff.

Furthermore, the psychiatric medical expert testified at the hearing that little mention of claimant's psychiatric condition was made until very recently in spite of claimant having seen numerous physicians over the past 16 years. Despite the addictive medications which claimant had taken for over 10 years, Dr. Gray concluded Mr. Price retained the residual functional capacity to understand, remember, carry out simple one-step tasks, and some complex tasks, under routine supervision with little evidence of frequent deficiencies of concentration. Specifically, Dr. Gray noted that claimant was able to drive his car wherever desired. Also there were no manic episodes described at any time by any of the doctors who have treated claimant (Tr. 21, 107-109).

Additional psychiatric evaluations completed by reviewing physicians, Drs. Boon, Goodrich, Fiegel, Anthony and Smallwood, further support the ALJ's conclusion. After independent review of the medical evidence, these physicians documented claimant's ability to understand, remember and carry out simple one-step tasks as well as some more detailed tasks under routine supervision. Although claimant could not relate effectively to the general

public, he could relate superficially to co-workers and supervisors about work matters (Tr. 95, 130, 131-139, 142, 156-157, 163).

Although plaintiff contends the ALJ disregarded the September 1993 report of Dr. Soria, the evidence does not support this allegation. The ALJ discussed at great length the post-hearing evidence submitted by plaintiff. Like Drs. Gray and Goodman, Dr. Soria recognized that claimant had a dependency toward prescription drugs, that claimant suffered from a borderline personality disorder, but, in addition, concluded that claimant suffered under Axis I with a cyclothymic disorder¹ or bipolar disorder² III. Similarly, Dr. Soria reported that claimant could not explain why he had not sought mental health evaluation or treatment although he complained of inability to cope with people and trouble concentrating (Tr. 24, 496-498). Whereas there was an indication that claimant had mood swings, there were no grandiose ideas that were elicited. Dr. Soria opined, "Although the patient does not fulfill the criteria of a full-blown manic depressive diagnosis or a bipolar I diagnosis, it appears that he has a cyclothymic or a bipolar disorder III" (Tr. 496-499). Even though Dr. Soria's report does not undermine the ALJ's conclusions, the ALJ properly gave lesser weight to this physician's conclusion in finding that the brief psychiatric care sought by claimant in July and August did not constitute grounds lending support to the credibility of

¹An extreme variation of mood lability with tendencies toward elation and hypomania on the one hand and depression on the other.

²This is a mood disorder characterized by swings from mania to depression.

the claimant (Tr. 24, 496). See 20 C.F.R. §404.1527.

Conclusively the ALJ found that claimant suffers from a personality disorder and a substance addiction disorder which limits claimant's ability to perform work-like activity. The ALJ specifically noted, and this Court agrees, that the Record supports no more than slight restrictions on claimant's activities of daily living, that claimant has no more than moderate difficulties in maintaining social functioning, that claimant seldom has deficiencies of concentration, persistence, or pace resulting in failure to complete tasks in a timely manner, and no evidence of episodes of deterioration or decompensation in work or work-like settings which cause the claimant to withdraw from such situations or to experience exacerbation of signs and symptoms (Tr. 25, 34). Therefore, the plaintiff failed to meet the severity requirements of the depressive syndrome under Listing 12.04. See Bernal v. Bowen, 851 F.2d 297, 300 (10th Cir. 1988); 20 C.F.R. §404.1525(c) and §416.925(c). Thus, the Court finds there is sufficient relevant evidence to support the ALJ's conclusion that claimant's condition was not severe enough to equal "the Listing" (Tr. 31). Furthermore, to the extent that claimant alleged disability from the psychiatric diagnoses given by Dr. Soria, there is substantial relevant evidence to support the ALJ's finding that claimant did not meet the Social Security Regulation requirements of 12 continuous months of inability to perform work-like activity (Tr. 24, 81, 496). See Sullivan v. Zebley, 493 U.S. 521, 530 (1990); 20 C.F.R. §404.1525(a) and §416.925(a).

Next, plaintiff argues that the ALJ erred by finding that claimant retained the residual functional capacity to perform his past relevant work despite his mental condition. Plaintiff supplements this argument by contending the ALJ did not consider the combination of his impairments in determining claimant was not disabled. Both arguments are without merit. Even a cursory review of the ALJ's decision would reveal a detailed and careful consideration to each of claimant's subjective complaints of disability. There is no evidence the ALJ so fragmentized claimant's several impairments or that he failed to consider claimant's impairments in combination. Hamilton v. Secretary, 961 F.2d 1495, 1500 (10th Cir. 1992). The Record indicated:

(1) that claimant had a history of hypertension, only partially controlled, but with no evidence of end organ damage;

(2) the claimant's corrected distance vision was 20/30 in both eyes;

(3) the claimant experienced a mild, high frequency hearing loss without significant impact on ability to perform work;

(4) the claimant has experienced weight gain but has not met or equaled a listing pertaining to obesity;

(5) the claimant has a history of peptic ulcer disease, but there is no evidence of any abnormality or active ulceration;

(6) the claimant was identified with mild pulmonary obstructive impairment but x-rays proved no evidence of active pulmonary disease in spite of the fact claimant continued to smoke three packs of cigarettes daily;

(7) the claimant has atypical chest pain, but had a negative exercise treadmill test and no evidence of coronary artery disease despite being overweight and a heavy smoker;

(8) the claimant has a history of knee surgery but does not use an assistive device in walking, has a normal gait with essentially normal ranges of motion; and

(9) the claimant has alleged tendonitis in the elbows, but there is no evidence of crepitus, no joint deformity, redness or swelling; he has full range of motion and good dexterity with motor grip strength equal bilaterally (Tr. 25-27).

Utilizing the evaluations of medical experts weighed in comparison with the medical documents, the ALJ correctly ruled that claimant's allegations of disability based upon these limitations are not credible (Tr. 27, 51, 76, 267, 283, 301). The ALJ's credibility determinations are generally treated as binding. Gossett v. Bowen, 862 F.2d 802, 807 (10th Cir.1988).

Likewise, based upon the consulting medical expert, the medical testifying expert as well as plaintiff's treating physicians, the ALJ concluded that claimant's major problem was his right shoulder. Recognizing the residual effects from the injury to claimant's right shoulder, the ALJ found that Mr. Price retained the residual functional capacity to perform a range of light work which involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds." See 20 C.F.R. §404.1567. The ALJ found that Mr. Price retained the capacity to stand/walk 6 hours in an 8-hour day, to do occasional

stooping but no overhead work or any work involving exposure to hazards such as unprotected heights or dangerous machinery, nor any work requiring good binocular vision. Further, the ALJ concluded that Mr. Price retained the ability to understand, remember, and carryout simple one-step tasks, and some, "but not all," more-detailed tasks under routine supervision only. (20 C.F.R. §404.1545 and §416.945) (Tr. 31).

Securing the services of the vocational expert, the ALJ determined that a significant number of jobs existed in the national economy which claimant was qualified to perform given his residual functional capacity. The vocational expert cited jobs at the sedentary exertional level: 14,000 jobs as billing clerk and 18,000 jobs as dispatcher; and at the light exertional level: 17,000 jobs as delivery driver and 82,000 jobs as assembly worker (Tr. 112-116). While plaintiff contends the vocational expert testified that if plaintiff were unable to get along with supervisors, unable to work under routine supervision, and unable to relate to supervisors and co-workers it would adversely impact claimant's ability to perform and maintain employment, the ALJ was not bound by this hypothetical based on unestablished assumptions. Because the Court has already affirmed the ALJ's conclusions regarding the limited nature and effect of plaintiff's mental impairments, the ALJ's findings based upon his hypothetical inquiries to the vocational expert provided a proper basis for the adverse determination of this case. Gay v. Sullivan, 986 F.2d 1341 (10th Cir. 1993); see also Talley v. Sullivan, 908 F.2d 585, 588

(10th Cir. 1990).

In conclusion, the Court finds there is substantial evidence in the Record to support the ALJ's finding that significant work exists in the national economy for which the claimant is qualified to perform, and thus, the claimant is not disabled.

It is the Order of the Court that the reference to the United States Magistrate Judge is hereby withdrawn.

It is the further Order of the Court that the decision of the Secretary is hereby AFFIRMED.

IT IS SO ORDERED THIS 12 DAY OF APRIL, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

FILED


ENTERED ON DOCKET
APR 13 1995
DATE

After carefully reviewing Plaintiff's objections and his motions with the deference due a pro se litigant, the Court concludes that Plaintiff's motions should be denied and that reasonable filing restrictions should be imposed as set out in the September 28, 1994 order. While Plaintiff argues that generally a pro se litigant should be given at least one "opportunity to correct any defects and to amend the complaint," the Court believes

that latitude should not be accorded in this case where the allegations are conclusory and lack any factual support, and Plaintiff vexatiously attempted to use this action to harass the Creek County District Attorney's Office.

Accordingly, Plaintiff is hereby enjoined from proceeding as a plaintiff in any new action before this Court unless he is represented by a licensed attorney admitted to the practice in this Court or unless he first obtains permission to proceed pro se as outlined in the September 28, 1994 order (doc. #58). Plaintiff's motion for extension of time (doc. #59) is granted but his motions for reconsideration, for discovery, for evidentiary hearing, and to amend the complaint (docs. #61-63) are denied.

SO ORDERED THIS 11th day of April, 1995.


H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APR 12 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THOMAS THIELE,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH
AND HUMAN SERVICES,

Defendant.

Case No. 93-C-341-E

ENTERED ON DOCKET

DATE APR 13 1995

ORDER

Now before the Court is the appeal of the plaintiff Thomas Thiele (Thiele) to the Secretary's denial of disability benefits.

Thomas Thiele claims that the Secretary erred in failing to award him disability insurance benefits. An administrative law judge denied his claim, and Thiele exhausted his administrative remedies before bringing this appeal. Thiele's claim was denied by an administrative law judge in Arkansas because that was where Thiele lived at the time he brought his claim. Thus, he argues, 8th Circuit law applies.

Thiele, who is 40, has a ninth grade education and has previously worked as a factory worker, maintenance man, machine operator and service station attendant. He claims that he has been disabled since October 1990 because of severe degenerative disc disease of the cervical and thoracic spine; spurring of the cervical spine; bilateral carpal tunnel with associated decreased strength, range of motion, loss of grip, and pain; knee pain; and a herniated disc at L5-S1. He also claims to have a heart condition which causes him chest pain, shortness of breath,

fatigue, and affects his ability to work. He is 5'10 1/2" tall, and weighs approximately 300 pounds. He testified that he can only walk 30 yards before experiencing chest pain, he can only stand five or ten minutes without changing positions and is unable stoop or bend.

The medical records indicate that Plaintiff had carpal tunnel surgery on both sides in 1984, but was released to return to work in February, 1985. He continued to complain of weakness in both hands and pain and was given permanent partial disability. In September, 1989, he complained of neck pain with radiation into both arms and legs, and was found to have a decreased range of motion, weakness on the left side, and spondylosis at the T12-L1 level. In October, 1989, x-rays of the cervical spine were normal and x-rays of the lumbar spine disclosed a minimal amount of spurring. He was noted on October 20, 1989 to have improvement in his holospinal discomfort and to be able to walk four miles a day. It was noted at that time that he was being treated for spondylosis of the thoracic and lumbar spine and degenerative disc disease and that he would need to be off work for two months.

In February, 1990, Plaintiff's treating physician, Dr. Knox saw him for neck and hip pain and recommended that he find a job with less physical demands. He released him to return to work, however, with a lifting restriction of no more than 40 pounds and noted that Plaintiff should lose between 80 and 100 pounds. The Doctor noted that he felt that the weight loss would eliminate the majority of Plaintiff's problems.

In July, 1990, after an automobile accident, Plaintiff saw Dr. Benjamin and complained of neck, shoulder, back and left hip pain. The Doctor stressed the importance of weight loss and gave him a full work release. In November, 1990, a myelogram showed the possibility of a herniated disk at the L4-L5 level. In January 1991, he was diagnosed with a herniation at the L5-S1 level, but was noted to have improved significantly with weight loss. He was released to work with a lifting restriction of no more than 10 pounds.

In January 1991, Plaintiff saw Dr. Atkinson for a cardiac evaluation, for complaints of chest pain and rapid heartbeat. Dr. Atkinson felt that plaintiff was a nonsurgical candidate for repair of a herniated disk and would be able to perform a work hardening program. In February, 1992, Dr. Atkinson found that he was not a candidate for work hardening and encouraged Plaintiff to return to school to find a less demanding occupation.

A psychiatrist who examined Plaintiff in April, 1992 found that his physical problems and financial situation created anxiety and nervousness which caused him to overeat and prevented him from getting enough sleep. He found that plaintiff had a very good to unlimited ability to carry out simple job instructions, follow work rules, relate to co-workers, and deal with the public.

The administrative law judge found that, while Plaintiff could not return to his previous work, there were jobs within the national economy that he could perform. He found that Plaintiff could not do any stooping or bending, could lift 10 pounds

frequently and 20 pound infrequently, and that while he complained of cardiac problems, there was no objective evidence of such problems on repeat stress tests. He recognized that Plaintiff had a herniated disk, but noted that the back problem was related to his obesity, and that Plaintiff had been repeatedly advised that if he would lose weight, the problem would be resolved. The ALJ found that the Plaintiff was not credible as to his pain and fatigue and that they were not disabling. He relied on the testimony of the vocational expert to find that Plaintiff could perform jobs such as cashier, motel night clerk, ticket cashier, telephone solicitor, and telephone answering service personnel.

Plaintiff claims that he meets or equals the impairment listed at 20 C.F.R. 404, Appendix 1, Subpart P, Regulations No. 4 §1.05 (C) for vertebrogenic disorders. He argues that the finding that he could perform light work is not supported by substantial evidence, that the ALJ improperly disregarded Plaintiffs complaints of pain, and that he improperly relied on the fact that Mr. Thiele refused to follow the advice of his doctors to lose weight. Defendant argues that the findings are supported by substantial evidence, and that the complaints of pain were properly analyzed.

Legal Analysis

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).
4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).
5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes V. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere

scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

This case was decided by the ALJ at the fifth sequential step, and thus the burden was on the Secretary to demonstrate that the Plaintiff was not disabled because he could perform other work in the national economy. Plaintiff argues first that the ALJ erred by not deciding the case at the third step, and in the alternative, that the ALJ's determination is not supported by substantial evidence.

The listing that Plaintiff claims he meets or equals is as follows:

- C. Other vertebrogenic disorders (e.g. herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last at least 12 months, With both 1 and 2:
 - 1. Pain, muscle spasm, and significant limitation of motion in the spine; and
 - 2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory reflex loss.

The ALJ specifically found that, according to the medical records, Plaintiff did not have an impairment which met or equalled a listed

impairment. While Plaintiff makes the assertion that he has an impairment which meets or equals the above listing, the medical records do not reveal that he has the significant pain, muscle spasm, limitation of motion, or motor loss required by the listing. The Court finds that the ALJ did not err in proceeding to the fourth and fifth steps of the analysis.

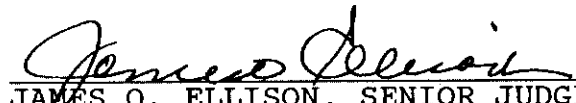
With respect to the ALJ's conclusion at the fifth sequential step, Plaintiff argues that the finding that he could perform light work is not supported by substantial evidence, that the ALJ improperly disregarded Plaintiffs complaints of pain, and that he improperly relied on the fact that Mr. Thiele refused to follow the advice of his doctors to lose weight. These arguments, however, are without merit. Plaintiff was released, numerous times, by his treating physicians, to return to work. The only "limitation" on this release is that Plaintiff pursue lighter work. Although Dr. Dean, an evaluating physician, found that Plaintiff could only perform sedentary work, that opinion is contrary to that of Plaintiff's treating physicians, and the ALJ properly relied on the opinion of the treating physicians. See Talbot v. Heckler, 814 F.2d 1456, 1463 (10th Cir. 1987) (reports of treating physicians are accorded greater weight than those of evaluating physicians).

The same evaluation applies to Plaintiff's complaints of pain and his failure to lose weight. The ALJ properly evaluated Plaintiff's pain complaints and found Plaintiff not to be credible. Moreover, the recording by Plaintiff's treating physicians of his complaints of pain does not constitute objective evidence of pain.

Lastly, none of Plaintiff's treating physicians concluded that he could not lose weight. In fact, they continued to suggest that he undertake a weight loss program. While Dr. Dean concluded that Plaintiff could not lose weight because he could not exercise, the Court adopts the opinion of Plaintiff's treating physicians that Plaintiff not only could, but should, lose weight in order to resolve his other difficulties.

The Secretary's denial of benefits is affirmed.

IT IS SO ORDERED THIS 12TH DAY OF APRIL, 1995.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

THOMAS IVY,

Plaintiff,

vs.

FIBERCAST COMPANY,

Defendant.

)
)
)
)
)
)
)
)
)
)

Case Number: 94 C 687-B

FILED

APR 12 1995

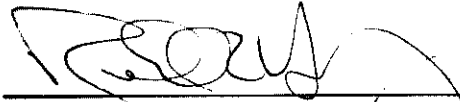
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL

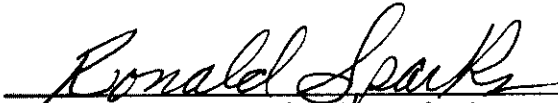
APR 13 1995

COMES NOW, the Plaintiff, Thomas Ivy, personally and through his attorney of record, Richard Blanchard, RICHARDS, PAUL, RICHARDS & SIEGEL, and the Defendant, Fiberblast Company, by and through Ronald Sparks, Vice-President Fiberblast Company, and through its attorneys of record, McGIVERN, SCOTT, GILLIARD, CURTHOYS & ROBINSON, by Ronald E. Hignight, and make and file their Joint Stipulation of Dismissal WITH PREJUDICE TO THE REFILING THEREOF, all pursuant to Rule 41(a)(1)(ii), each showing, and affirming by the execution of this stipulation, that all parties who have appeared in this action have executed this stipulation and agree that the matter should be dismissed with prejudice to the refiling thereof.

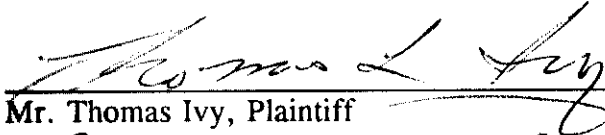
IT IS SO STIPULATED:



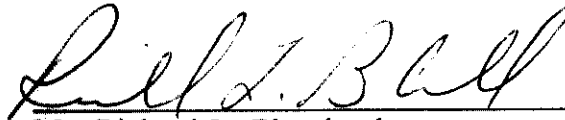
Ronald E. Hignight, O.B.A. #10334
McGIVERN, SCOTT, GILLIARD, CURTHOYS
& ROBINSON, Attorneys for Fibercast
1515 South Boulder, P.O. Box 2619
Tulsa, Oklahoma 74101-2619
(918) 584-3391



Mr. Ronald Sparks, for the Defendant
Vice-President
FIBERCAST COMPANY
P.O. Box 968
Sand Springs, OK 74083



Mr. Thomas Ivy, Plaintiff



Mr. Richard L. Blanchard
RICHARDS, PAUL, RICHARDS & SIEGEL
Attorneys for Plaintiff
9 E. 4th Street, Suite 400
Tulsa, Oklahoma 74103-5118
(918) 584-2583

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RUSSELL McINTOSH,

Plaintiff,

vs.

BANCOKLAHOMA MORTGAGE CO.,
et al.,

Defendant.

No. 94-C-929-B

APR 13 1995

FILED

APR 12 1995

Richard J. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO BRUMBAUGH & FULTON CO.**

Come now the Plaintiff, Russell McIntosh, by and through his attorney, Braswell & Associates, Inc., and the Defendant, Brumbaugh & Fulton Co., and hereby enter into a stipulation of dismissal with prejudice, pursuant to Rule 41 (a)(1), Federal Rules of Civil Procedure.

Ronald Main

Ronald Main
MAIN & HEROUX
2021 South Lewis Avenue
Suite 350
P.O. Box 521150
Tulsa, OK 74152-1150
Attorney for Brumbaugh & Fulton
Company
(918) 742-1990

Michael T. Braswell

Michael T. Braswell, OBA #1082
BRASWELL & ASSOCIATES, INC.
3621 N. Kelley - Suite 100
Oklahoma City, Okla. 73111

Attorney for Plaintiff
(405) 232-1950

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RUSSELL MCINTOSH,

Plaintiff,

vs.

BANCOKLAHOMA MORTGAGE CO.,
et al.,

Defendant.

No. 94-C-929-B

FILED ON DOCKET

APR 13 1995

FILED

APR 12 1995

Richard J. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

**STIPULATION OF DISMISSAL WITH PREJUDICE
AS TO LOCAL AMERICA BANK**

Come now the Plaintiff, Russell McIntosh, by and through his attorney, Braswell & Associates, Inc., and the Defendant, Local America Bank., and hereby enter into a stipulation of dismissal with prejudice, pursuant to Rule 41 (a)(1), Federal Rules of Civil Procedure.

Ronald Main

Ronald Main
MAIN & HEROUX
2021 South Lewis Avenue
Suite 350
P.O. Box 521150
Tulsa, OK 74152-1150
Attorney for Local America Bank
(918) 742-1990

Michael T. Braswell

Michael T. Braswell, OBA #1082
BRASWELL & ASSOCIATES, INC.
3621 N. Kelley - Suite 100
Oklahoma City, Okla. 73111

Attorney for Plaintiff
(405) 232-1950

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE APR 13 1995

BETSY BROOKE WILLIAMSON,

Plaintiff,

vs.

MAPCO INC.,

Defendant.

No. 94-C-595-K

FILED

APR 12 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STIPULATION OF DISMISSAL

COME NOW the Plaintiff, Betsy Brooke Williamson, and the Defendant, MAPCO Inc., by and through their attorneys, pursuant to Fed. R. Civ. P. 41(a), and hereby dismiss this action with prejudice.

Respectfully submitted,

By: 

Earl W. Wolfe
3314 East 51st Street
Suite 201-B
Tulsa, Oklahoma 74135
(918) 743-3700

ATTORNEY FOR BETSY BROOKE
WILLIAMSON

By: 

John T. Schmidt
C. Kevin Morrison
CONNER & WINTERS
2400 First National Tower
Tulsa, Oklahoma 74103-4391
(918) 586-5711

ATTORNEYS FOR MAPCO INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APR 1 1 1995

Plaintiffs,

VS.

THE HISSOM MEMORIAL CENTER,
et al.,

Defendants.

No. 87-C-704-E

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE APR 12 1995

ORDER

Now before the Court is **the Plaintiffs' Motion and Authority to Set Aside the Judgment under Rule 60(b)(6), Fed.R.Civ.P., and in the Alternative to Reopen the Case Under Rule 59(a), Fed.R.Civ.P., or to Alter or Amend the Judgment Under Rule 59(e), Fed.R.Civ.P., Based on the False Testimony of Lana Tyree (Docket #320).**

In this matter, Plaintiffs', as prevailing parties, applied for, and were granted, their attorneys' fees. On appeal, the Tenth Circuit rejected the hourly rate of Louis Bullock and held that he should receive the prevailing market rate of \$125 per hour. Plaintiffs now seek to set aside the resulting judgment, asserting that the conclusion that the prevailing market rate is \$125 per hour is based solely on the false testimony of Lana Tyree, and is therefore erroneous.

Plaintiffs seek relief under Rule 60, Fed.R.Civ.P., which provides in pertinent part, "On the motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. In the alternative, Plaintiffs

seek a new trial under Rule 59, Fed.R.Civ.P. Defendants argue that neither Rule 60 nor Rule 59 is applicable to the facts of this case. Notwithstanding these rules, however, the Court finds that the argument advanced by Plaintiffs does not provide grounds for relief from the Judgment or Order, regardless of the procedural grounds asserted.

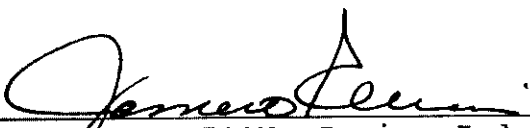
The sole basis for the Plaintiffs' motion is their belief that Lana Tyree was not candid with this Court, and that the Tenth Circuit then based its holding solely on the false testimony of Lana Tyree. In arguing that Ms. Tyree was not honest in her testimony before this Court, Plaintiffs compare certain of her testimony with testimony she gave in another case almost two years later. In this case, she testified that she could not make the blanket statement that it is common in the practice of law within the state of Oklahoma to charge a lower hourly rate to clients who provide a substantial volume of work over time and that she charges some school districts \$110 an hour and some \$125 an hour because of the difference in the time period she was retained. Plaintiffs assert that in a case in the Eastern District of Oklahoma, Ms. Tyree testified that the rate of \$100 to \$125 per hour was a reduced fee based on regular business provided by the school districts.

The Court finds that this asserted discrepancy in the testimony of Ms. Tyree does not provide a factual basis for the relief requested by the Plaintiffs. First, it is not at all clear that Ms. Tyree testified that her rate of \$100 to \$125 was a

reduced rate. Moreover, even if it was a reduced rate in 1994, it was not necessarily a reduced rate in 1992. Additionally, despite the arguments of Plaintiffs' to the contrary, the court does not see any conflict in the testimony of Ms. Tyree, and even if Ms. Tyrees' rates of \$110 to \$125 an hour were reduced rates, Ms. Tyree was never asked the question in this case whether her rates were reduced. Moreover, the Court notes that the Tenth Circuit had before it the testimony of John Moyer which supports its finding that the prevailing rate is \$125.

Plaintiffs' Motion to Set Aside the Judgment under Rule 60(b)(6), Fed.R.Civ.P., and in the Alternative to Reopen the Case Under Rule 59(a), Fed.R.Civ.P., or to Alter or Amend the Judgment Under Rule 59(e), Fed.R.Civ.P., Based on the False Testimony of Lana Tyree (Docket # 320) is Denied.

So ORDERED this 10th day of April, 1995.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**
NORTHERN DISTRICT OF OKLAHOMA **APR 11 1995** *R*

UNITED SIDING SUPPLY, INC.,)

Plaintiff,)

vs.)

UNITED STATES OF AMERICA,)
ex rel., INTERNAL REVENUE)
SERVICE, CENTRAL SALES AND)
INSTALLATION, INC., and)
MIKE NEUBURGER, individually,)

Defendants.)

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 93-C-607-BU ✓

ENTERED ON DOCKET

DATE APR 12 1995

J U D G M E N T

This matter came on for trial before the Court sitting without a jury, and the defendants, Central Sales and Installation, Inc. and Patrick Michael Neuburger, having been dismissed from the action and the remaining issues between the plaintiff, United Siding Supply, Inc., and the defendant, United States of America, ex rel., Internal Revenue Service, having been duly tried and a decision having been duly rendered on those issues,

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendant, United States of America, ex rel., Internal Revenue Service, against the plaintiff, United Siding Supply, Inc., and that the defendant, United States of America, ex rel., Internal Revenue Service, recover from the plaintiff, United Siding Supply, Inc., its costs of action.

DATED at Tulsa, Oklahoma, this 11 day of April, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 11 1995 *RL*

UNITED SIDING SUPPLY, INC.,)

Plaintiff,)

vs.)

UNITED STATES OF AMERICA,)
ex rel., INTERNAL REVENUE)
SERVICE, CENTRAL SALES AND)
INSTALLATION, INC., and)
MIKE NEUBURGER, individually,)

Defendants.)

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 93-C-607-BU ✓

ENTERED ON DOCKET

DATE APR 12 1995

ORDER

This matter came on for trial before the Court sitting without a jury on September 21, 1994. Having considered the evidence introduced at trial, including both testimonial and documentary, and having considered the arguments of counsel, the Court enters the following findings of fact and conclusions of law.

Findings of Fact

1. At all times relevant to this action, the plaintiff, United Siding Supply, Inc. ("United"), was an Oklahoma corporation engaged in the business of selling siding supplies, windows, shutters and other building materials to contractors, builders and lumber yards on a wholesale basis.

2. At all times relevant to this action, the defendant, Central Sales and Installation, Inc. ("Central"), was a Kansas corporation engaged in the business of selling home improvement materials, including siding, on a retail basis.

3. At all times relevant to this action, the defendant,

29

Patrick Michael Neuburger ("Neuburger"), was an officer, director and a shareholder of Central.

4. On or about November 24, 1987, Central entered into a Purchase Agreement with United, which provided that Central, with exception to its Wichita store, would purchase 95% of its inventory (siding, soffit, coil, accessories and insulation) from United. Under the Purchase Agreement, Central granted United a first prior and superior security interest in the assets of Central. United's security interest in Central's assets was perfected prior to September, 1988.

5. Subsequently, Central became delinquent on its payments under the Purchase Agreement. United filed a complaint against Central in the United States District Court for the District of Kansas on October 25, 1988. In its complaint, United requested a judgment in the amount of \$175,342.15, plus interest, and foreclosure of its security interest in Central's assets.

6. In its complaint, United alleged that in addition to the obligations owed to United, Central had "past-due and outstanding tax indebtedness" that it was unable to satisfy. It also alleged that Central was "unable to pay its indebtedness as that indebtedness [fell] due."

7. On November 4, 1988, the Court, upon motion by United, issued a preliminary injunction against Central. Central was specifically enjoined from concealing, removing, damaging, destroying, encumbering, mortgaging or otherwise alienating United's collateral. In addition, Central was required to deposit

all cash and receivables in certain bank accounts and was required to obtain prior written approval from United of all checks and/or drafts written on those bank accounts.

8. One of the reasons United requested the injunction was that it did not trust Central's management to honor Central's obligation to United.

9. Central sent check approval requests to United via facsimile. An officer or employee of United would then approve or disapprove the expenditure from Central's bank accounts.

10. In addition to the check approval requests, Central also submitted its check register to United. The check register provided United with an accounting of each check written on the bank accounts of Central.

11. By receipt of the check approval requests and the check register, United was able to monitor and determine the financial priorities of Central.

12. During the injunction, Central sent check approval requests for employee wages, which United approved. Central, however, did not submit any check approval requests for the payment of federal employment taxes.

13. Periodically, United directed Central to write checks specifically to it.

14. Central failed to pay employment taxes due and owing for the tax periods ending September 30, 1988 and December 31, 1988. As a result, the Internal Revenue Service made an assessment against Central for the taxes.

15. On April 13, 1989, the preliminary injunction against Central was lifted due to Central's satisfaction of its obligation to United under the Purchase Agreement. United's action against Central was dismissed.

16. On November 18, 1991, a penalty assessment was made against United in the amount of \$24,555.95, for the employment taxes due by Central for the tax periods ending September 30, 1988 and December 31, 1988. In assessing the penalty pursuant to 26 U.S.C. § 6672, the Internal Revenue Service concluded that United was a party responsible for the taxes and had willfully failed to collect, truthfully account for and pay over the taxes.

17. On February 11, 1992, United paid, under protest, \$25,155.35 for the employment taxes owed by Central for the tax periods ending September 30, 1988 and December 31, 1988.

18. United submitted a claim for refund to the Internal Revenue Service. The claim was denied on February 11, 1993.

19. United commenced this action on July 2, 1993 seeking, inter alia, a refund of the taxes paid under protest.

20. On the date the injunction was entered, Central's bank accounts indicated that Central had sufficient funds to satisfy the outstanding employment tax obligations owed for the tax period ending September 30, 1988.

21. During the injunction, United disapproved two check approval requests submitted by Central. One of those requests was for payment of an American Express bill for personal expenses incurred by Neuburger. Central went ahead and paid the bill.

Although United could have enforced the injunction to stop the payment, United declined to do so. The other check approval request was for payment to a creditor, Target Aluminum. After discussions with Central, United approved the payment.

22. In the complaint, United named Central and Neuburger as defendants. No service was obtained on these defendants and the parties stipulated that the action should proceed without these defendants.

Conclusions of Law

1. Any findings of fact which may be deemed conclusions of law are incorporated herein.

2. The Court has jurisdiction over this action under 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422(a).

3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e).

4. Sections 3102(a) and 3402(a) of Title 26 of the United States Code require an employer to deduct and withhold income and social security taxes from the wages paid to its employees. 26 U.S.C. § 3102(a) and § 3402(a). Section 7501 of Title 26 of the United States Code provides that the amount of taxes collected or withheld shall be held to be a special fund in trust for the United States. 26 U.S.C. § 7501. These withheld taxes are "for the exclusive use of the United States and are not to be used to pay the employer's business expenses, including salaries, or for any other purpose." Graunke v. United States, 711 F.Supp. 388, 391 (N.D.Ill. 1989).

5. To account for these taxes an employer must deposit the withheld taxes on a timely basis and file a quarterly tax return at the end of the month following the taxable quarter for which the return is made. 26 C.F.R. § 31.6011(a)-1(a)(1), § 31.6011(a)-(4)(a)(1) and 31.6071(a)-1(a)(1).

6. In imposing the collection obligation and the liability for withheld taxes upon the employer, Congress recognized that corporate employers might fail to set aside and pay over these taxes to the government. Therefore, to ensure collection of the taxes, Congress enacted 26 U.S.C. § 6671 and § 6672.

7. Section 6672 provides that "any person required to collect, truthfully account for, and pay over any tax . . . who willfully fails to collect such tax, or truthfully account for and pay over such tax . . ." shall be personally liable to the United States for the full amount of the withholding taxes not collected or paid to the United States. 26 U.S.C. § 6672. Section 6671(a) provides that the "100-percent penalty" liability shall be assessed and collected in the same manner as taxes. 26 U.S.C. § 6671(a).

8. There are two elements for liability under § 6672. First, the person upon whom liability is to be imposed must be a "person required to collect, truthfully account for and pay over any tax." Second, such "responsible person" must have "willfully failed to collect, truthfully account for, or pay over federal employment taxes." 26 U.S.C. § 6672; Muck v. United States, 3 F.3d 1378, 1380 (10th Cir. 1993).

9. Federal tax assessments are presumed correct.

Consequently, the burden is upon the party assessed to prove by a preponderance of the evidence that it was not a responsible party or that its failure to pay the taxes was not willful. Ruth v. United States, 823 F.2d 1091, 1092-93 (7th Cir. 1987).

10. A "responsible person" is one who has a duty to perform any of the three functions enumerated in § 6672. Slodov v. United States, 436 U.S. 238, 243 (1978). Responsibility is a matter of status, duty, and authority, not knowledge. Mazo v. United States, 591 F.2d 1151, 1153 (5th Cir. 1979), cert. denied, Lattimore v. United States, 444 U.S. 842 (1979); Scott v. United States, 702 F.Supp. 261, 263 (D.Colo. 1988).

11. The control necessary to support liability under § 6672 is the ability to direct or control the payment of corporate funds. Spang v. United States, 533 F.Supp. 220, 225 (W.D. Okla. 1982). The term "responsible person" is very broad and may in particular circumstances include employees, stockholders, lenders and others outside the corporate organization. Fidelity Bank, N.A. v. United States, 616 F.2d 1181, 1185 (10th Cir. 1980). A "responsible person" is any person who has a significant, though not necessarily exclusive, authority in the business affairs or the fiscal decisionmaking of the corporation. Muck, 3 F.3d at 1381; Denbo v. United States, 988 F.2d 1029, 1032 (10th Cir. 1993); Turner v. United States, 423 F.2d 448, 449 (9th Cir. 1970); Spang, 533 F.Supp. at 225.

12. As to the second element of § 6672, "willfulness" means a "voluntary, conscious and intentional decision to prefer other

creditors over the Government.'" Muck, 3 F.3d at 1381. Proof of willfulness does not require bad motive or evil intent. Id. Willfulness is established for the purposes of § 6672 where an otherwise responsible person has knowledge of the unpaid employment taxes, and prefers other creditors over the United States. Id. In addition, willfulness is established if a responsible person shows a "reckless disregard of a known or obvious risk that trust funds may not be remitted to the government." Denbo, 988 F.2d at 1033. A responsible person's failure to investigate or to correct mismanagement after being notified that withholding taxes have not been paid satisfies the § 6672 willfulness requirement. Id.

13. In the instant case, the Court finds that United has failed to sustain its burden in establishing that it was not a responsible person for purposes of § 6672. The Court finds that United did have significant ability to direct or control the payment of corporate funds of Central. With the injunction, United had the authority to make the final decision concerning the disbursement of funds from Central's bank accounts and had the authority to determine which creditors were to be paid and when. This authority renders United "a responsible person" within the purview of § 6672.¹


¹The fact that United became a "responsible person" after the September 30, 1988 tax quarter does not preclude United from being held liable for the withheld employment taxes for that quarter. A "responsible person" may become liable for failing to pay over taxes collected prior to becoming a "responsible person" to the extent there are unencumbered funds available to pay over to the government. Slodov, 436 U.S. at 259-60. In the instant case, the record reveals that there were sufficient unencumbered funds to satisfy Central's payroll taxes.

14. The Court additionally finds that the record supports a finding that United acted willfully in failing to pay employment taxes to the government. As United knew that Central had a pre-existing sales-tax liability to the State of Kansas, knew that Central could not pay debts as they became due, and knew that check approval requests were being submitted only for wages and not federal employment taxes, United acted in reckless disregard of an obvious or known risk that Central would not make their quarterly tax deposits.

15. Because the Court finds that United has not sustained its burden of proof that it was not a responsible person under § 6672 and that it did not willfully fail to collect, truthfully account for and pay Central's employment taxes, the Court finds that the defendant, United States of America, ex rel., Internal Revenue Service, is entitled to judgment against the plaintiff, United Siding Supply, Inc.

16. In light of the fact that United failed to obtain service upon the Central and Neuburger and the parties stipulated that the action should proceed without these defendants, the Court finds that the claims against these defendants should be and are hereby DISMISSED.

ENTERED this 11th day of April, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 10 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TRADEMARK MECHANICAL, INC.,

Plaintiff,

vs.

CRANE CONSTRUCTION CO., et al,

Defendants.

Case No. 94-C-815-B ✓

EOD 4/12/95

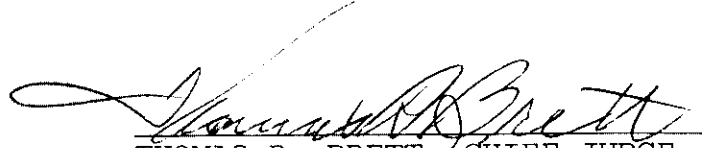
JUDGMENT DISMISSING ACTION
BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Judgment by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 10th day of April, 1995.


THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 11 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RUSSELL McINTOSH,

Plaintiff

vs.

NO. 94-C-929-E

BANCOKLAHOMA MORTGAGE CO.,
ET AL.,

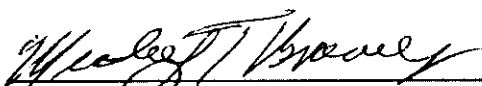
Defendants

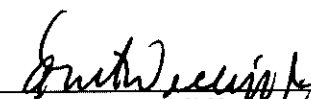
§
§
§
§
§
§
§
§
§
§

STIPULATION OF DISMISSAL

Plaintiff Russell McIntosh ("Plaintiff"), acting through his undersigned counsel, and Defendant Bank United of Texas FSB ("Bank United"), acting through its undersigned counsel, have stipulated that Plaintiff's claims against Bank United in the above-captioned matter have been fully compromised and settled, and that Bank United has been fully released therefrom. Therefore, Plaintiff's entire case against Bank United should be fully and finally dismissed with prejudice.

Dated April 10 1995.


Michael T. Braswell
Oklahoma State Bar No. 1082
Braswell & Associates
3621 N. Kelley, Suite 100
Oklahoma City, OK 73111
Telephone: (405) 232-1950
Telecopier: (405) 424-8084
Attorney for Plaintiff


A. Martin Wickliff, Jr.
Texas State Bar No. 21419900
Wickliff & Hall, P.C.
1000 Louisiana, Suite 5400
Houston, Texas 77002
Telephone: (713) 750-3100
Telecopier: (713) 750-3101
Attorney for Defendant

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

APR 10 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

THOMAS LEE PRICE,

Plaintiff,

v.

DICKIE SNEED, et al.,

Defendants.

Case No. 94-C-127-H ✓

ENTERED ON DOCKET

DATE APR 12 1995

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Defendants' Joint Motion for Summary Judgment (Docket #18)¹. Plaintiff has not responded. On March 13, 1995, he was advised by the court of Rule 7.1 of the Local Rules for the District Court for the Northern District of Oklahoma, which provides that he had fifteen (15) days from the date of the filing of the motion for summary judgment to respond to it or the court, in its discretion, could deem the matter confessed and enter the relief requested. He was granted fifteen (15) additional days to respond. The court in its discretion deems the matter confessed.

Plaintiff claims defendants used excessive force in arresting him on January 17, 1993 and illegally seized his personal property, including a truck, horse trailer, rifle, and bull. Defendants have presented sworn affidavits of several officers present when plaintiff was arrested who deny that they used unreasonable force during the incident and state that at no time did plaintiff seek medical attention or complain of injury during his incarceration. (Exhibits "A"- "D" to Defendants' Brief in Support of Joint Motion for Summary Judgment

¹ "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

("Brief") (Docket #19)). Defendants have submitted a copy of the judgment and sentence of plaintiff following his plea of guilty to larceny of an automobile and possession of marijuana subsequent to the arrest (Exhibit "I" to Brief (Docket #19)). Finally, Defendants have submitted documents showing that plaintiff's truck, horse trailer, rifle, and bull were seized and forfeited pursuant to Oklahoma drug forfeiture statutes after proper notice was issued, and plaintiff was represented by an attorney during all phases of the civil action (Exhibits "E"-"G" to Brief (Docket #19)). Plaintiff signed a waiver of any claim to the property on June 24, 1993. (Exhibit "F-10" to Brief (Docket #19)).

Summary judgment is appropriate if the moving party can demonstrate that there is no genuine issue as to any material fact, and entitlement to judgment as a matter of law. Rule 56(c), Red.R.Civ.P.²

Defendants' Joint Motion for Summary Judgment (Docket #18) should be granted.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and

²The court applies the well-established framework for analysis of summary judgment motions. "[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.

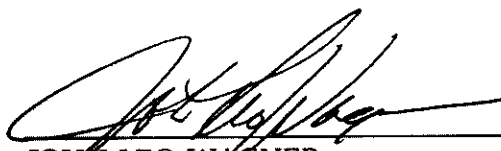
A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court stated that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts". Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing ... are not sufficient to establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 7th day of April, 1995.

A handwritten signature in black ink, appearing to read "John Leo Wagner", written over a horizontal line.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

T:Price.rr

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD TACKETT aka RICHARD L.
TACKETT aka RICHARD LEE
TACKETT; VAUNITA TACKETT aka
VAUNITA L. TACKETT aka VAUNITA
LYNN TACKETT; STATE OF
OKLAHOMA ex rel OKLAHOMA TAX
COMMISSION; CITY OF BROKEN
ARROW, Oklahoma; COUNTY
TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

FILED

APR 10 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE APR 11 1995

Civil Case No. 94-C 938BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10 day of April,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, State of Oklahoma ex rel Oklahoma Tax Commission, appears by Assistant General Counsel Kim D. Ashley; the Defendant, City of Broken Arrow, Oklahoma, appears by Michael R. Vanderburg, City Attorney; the Defendant, American Building Maintenance, Co., appears by its Attorney C.S. Lewis, III; and the Defendants, Richard Tackett aka Richard L. Tackett aka Richard Lee Tackett and Vaunita Tackett aka Vaunita L. Tackett aka Vaunita Lynn Tackett, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Richard Tackett aka Richard L. Tackett aka Richard Lee Tackett**, will hereinafter be referred to as ("**Richard Tackett**"); and the Defendant, **Vaunita Tackett aka Vaunita L. Tackett aka Vaunita Lynn Tackett**, will hereinafter be referred to as ("**Vaunita Tackett**"). The Defendants, **Richard Tackett** and **Vaunita Tackett** are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, **Richard Tackett**, waived service of Summons on December 15, 1994; that the Defendant, **Vaunita Tackett**, waived service of Summons on December 15, 1994; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, acknowledged receipt of Summons and Complaint by Certified Mail on October 6, 1994.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on October 19, 1994; that the Defendant, **American Building Maintenance, Co.**, filed its Answer on March 17, 1995; that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, filed its Answer on November 18, 1994; that the Defendant, **City of Broken Arrow, Oklahoma**, filed its Answer on October 20, 1994; and that the Defendants, **Richard Tackett and Vaunita Tackett**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Three (3), Block nine (9), HIDDEN SPRINGS, an addition to the City of Broken Arrow, Tulsa county, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on February 7, 1985, the Defendants, Richard Tackett and Vaunita Tackett, executed and delivered to HARRY MORTGAGE CO., their mortgage note in the amount of \$64,350.00, payable in monthly installments, with interest thereon at the rate of eleven and one-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Richard Tackett and Vaunita Tackett, husband and wife, executed and delivered to HARRY MORTGAGE CO. a mortgage dated February 7, 1985, covering the above-described property. Said mortgage was recorded on February 8, 1985, in Book 4843, Page 2315, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 25, 1985, HARRY MORTGAGE CO. assigned the above-described mortgage note and mortgage to SECURITY PACIFIC MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on March 27, 1985, in Book 4852, Page 388, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 10, 1987, SECURITY PACIFIC MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to FLEET REAL ESTATE FUNDING CORP. This Assignment of Mortgage was recorded on April 5, 1983, in Book 5091, Page 153, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 19, 1989, Fleet Real Estate Funding Corp. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment

of Mortgage was recorded on June 8, 1989, in Book 5187, Page 2390, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 14, 1988, the Defendants, Richard Tackett and Vaunita Tackett, filed their Chapter 7 petition for bankruptcy relief in the United States Bankruptcy Court for the Northern District of Oklahoma, case number 88-03490C, which was discharged on March 3, 1989, and closed on April 20, 1989.

The Court further finds that on May 5, 1989, the Defendants, Richard Tackett and Vaunita Tackett, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on June 1, 1990, May 30, 1991, and September 25, 1992.

The Court further finds that the Defendants, Richard Tackett and Vaunita Tackett, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Richard Tackett and Vaunita Tackett, are indebted to the Plaintiff in the principal sum of \$100,488.56, plus interest at the rate of 11.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$48.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$36.00 which became a lien as of June

25, 1993; and a lien in the amount of \$45.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, has a lien on the property which is the subject matter of this action by virtue of a tax warrant in the amount of \$4,331.68, plus interest, penalties, and costs, which became a lien on the property as of November 24, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **American Building Maintenance, Co.**, has a lien on the property with is the subject matter of this action by virtue of a judgment in the amount of \$27,137.35, together with interest thereon from April 6, 1992, and an attorney fee of \$1,500.00. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **Richard Tackett and Vaunita Tackett**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title, or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, **Richard Tackett and Vaunita Tackett**, in the principal sum of \$100,488.56, plus interest at the rate of 11.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.4 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of \$129.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel Oklahoma Tax Commission**, have and recover judgment in rem in the amount of \$4,331.68, plus the costs of this action for a tax warrant.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **American Building Maintenance, Co.**, have and recover judgment in the amount of \$27,137.35, plus interest, attorney fees, and the costs of this action for a judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **City of Broken Arrow, Oklahoma**, has no right, title, or interest in the subject

real property except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Richard Tackett, Vaunita Tackett, and the Board of County Commissioners, Tulsa County, Oklahoma,** have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Richard Tackett and Vaunita Tackett,** to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, **County Treasurer, Tulsa County, Oklahoma,** in the amount of \$48.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, State of Oklahoma ex rel
Oklahoma Tax Commission, in the amount of \$4,331.68,
plus accrued and accruing interest, for state taxes
which are currently due and owing.

Fifth:

In payment of Defendant, County Treasurer, Tulsa County,
Oklahoma, in the amount of \$81.00, personal property taxes
which are currently due and owing.

Sixth:

In payment of Defendant, American Building Maintenance, Co.,
in the amount of \$27,137.35, plus interest and attorney fee,
for a judgment .

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await
further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that
pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all
instances any right to possession based upon any right of redemption) in the mortgagor or
any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under and by virtue of this judgment
and decree, all of the Defendants and all persons claiming under them since the filing of the

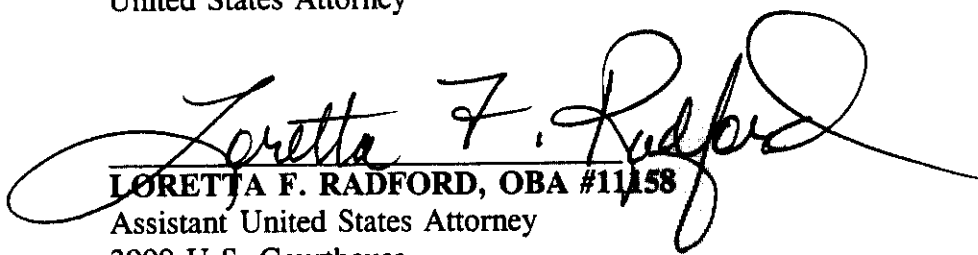
Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ MICHAEL BURRAGE

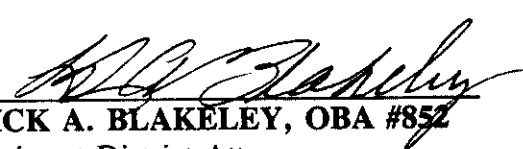
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 938BU

LFR:lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 10 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RONALD ALLEN WILEY; PEGGY
MARIE WILEY; COUNTY
TREASURER, Rogers County, Oklahoma;
BOARD OF COUNTY
COMMISSIONERS, Rogers County,
Oklahoma,

Defendants.

Civil Case No. 94-C 1128BU

ENTERED ON DOCKET
DATE APR 11 1995

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 10 day of April, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, **County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma**, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; and the Defendants, **Ronald Allen Wiley and Peggy Marie Wiley**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, Ronald Allen Wiley and Peggy Marie Wiley, are Husband and Wife.

The Court being fully advised and having examined the court file finds that the Defendant, **Ronald Allen Wiley**, was served with process as shown on the U.S. Marshal Service on February 23, 1995; that the Defendant, **Peggy Marie Wiley**, acknowledged receipt of Summons and Complaint via Certified mail on January 12, 1995; that Defendant,

County Treasurer, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint via Certified mail on or about **December 15, 1994**; and that Defendant, **Board of County Commissioners, Rogers County, Oklahoma**, acknowledged receipt of Summons and Complaint via Certified mail on or about **December 15, 1994**.

It appears that the Defendants, **County Treasurer, Rogers County, Oklahoma**, and **Board of County Commissioners, Rogers County, Oklahoma**, filed their Answer on December 19, 1994; and that the Defendants, **Ronald Allen Wiley and Peggy Marie Wiley**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Rogers County, **Oklahoma**, within the Northern Judicial District of Oklahoma:

**Lot 29 in Block 2 of SHADOW VALLEY SUBDIVISION
and Addition to the City of Catoosa, Rogers County,
Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on December 28, 1983, Sandy Lea Carolan, executed and delivered to REALBANC, INC. her mortgage note in the amount of \$45,250.00, payable in monthly installments, with interest thereon at the rate of twelve and one-half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Sandy Lea Carolan, a single person, executed and delivered to REALBANC, INC. a mortgage dated December 28, 1983, covering the above-described property. Said

mortgage was recorded on January 5, 1984, in Book 665, Page 697, in the records of Rogers County, Oklahoma.

The Court further finds that on June 6, 1988, Firstier Mortgage Company (formerly known as RealBanc, Inc.) assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was recorded on September 20, 1988, in Book 792, Page 605, in the records of Rogers County, Oklahoma.

The Court further finds that on December 6, 1988, LEADER FEDERAL SAVINGS AND LOAN ASSOCIATION assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, his successors in office and assigns. This Assignment of Mortgage was recorded on December 6, 1988, in Book 797, Page 422, in the records of Rogers County, Oklahoma.

The Court further finds that the Defendants, Ronald Allen Wiley and Peggy Marie Wiley, are the record title holders of the property by virtue of a General Warranty Deed dated November 3, 1988, and recorded on February 15, 1989 in Book 802, Page 218, in the records of Rogers County, Oklahoma. The Defendants, Ronald Allen Wiley and Peggy Marie Wiley, are the current assumptors of the subject indebtedness.

The Court further finds that on April 1, 1989, the Defendants, Ronald Allen Wiley and Peggy Marie Wiley, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on June 1, 1990, April 1, 1991, and July 1, 1991.

The Court further finds **that the Defendants, Ronald Allen Wiley and Peggy Marie Wiley**, made default under the **terms of the aforesaid note and mortgage**, as well as the terms and conditions of the forbearance **agreements**, by reason of their failure to make the monthly installments due thereon, which **default** has continued, and that by reason thereof the Defendants, **Ronald Allen Wiley and Peggy Marie Wiley**, are indebted to the Plaintiff in the principal sum of \$58,789.70, plus **interest** at the rate of 12.5 percent per annum from August 1, 1994 until judgment, plus **interest** thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds **that the Defendant, County Treasurer, Rogers County, Oklahoma**, has a lien on the **property** which is the subject matter of this action by virtue of personal property taxes in the **amount** of \$10.70 which became a lien on the property as of June 11, 1993; and a lien **in the** amount of \$9.80 which became alien as of June 16, 1994. Said liens are inferior to **the** interest of the Plaintiff, United States of America.

The Court further finds **that the Defendant, Board of County Commissioners, Rogers County, Oklahoma**, claims no right, title or interest in the subject real property

The Court further finds **that the Defendants, Ronald Allen Wiley and Peggy Marie Wiley**, are in default, and have **no right**, title or interest in the subject real property.

The Court further finds **that pursuant to 12 U.S.C. 1710(1)** there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any **other person** subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **Ronald Allen Wiley and Peggy Marie Wiley**, in the principal sum of \$58,789.70, plus interest at the rate of 12.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.41 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Rogers County, Oklahoma**, have and recover judgment in the amount of \$20.50 for personal property taxes for the years 1992-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Ronald Allen Wiley, Peggy Marie Wiley and Board of County Commissioners, Rogers County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Ronald Allen Wiley and Peggy Marie Wiley**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of **this** action accrued and accruing incurred by the Plaintiff, **including** the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Rogers County, Oklahoma, in the amount of \$20.50, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

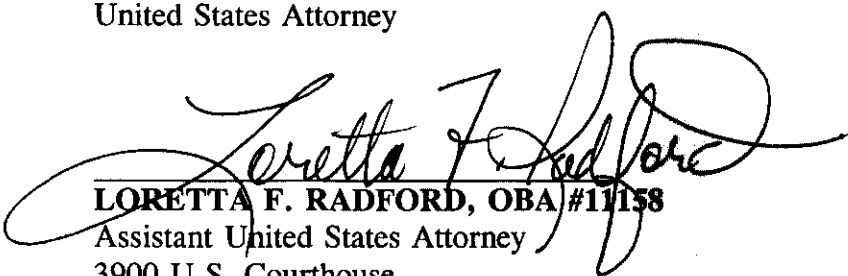
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

W/ MICHAEL BURFAGE


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



MICHELE L. SCHULTZ, OBA #13771
Assistant District Attorney
219 S. Missouri, Room 1-111
Claremore, OK 74017
(918) 341-3164
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Rogers County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C 1128BU

LFR:lg